Supreme Court, U.S.
FILED
SEP 12 1983
ALEXANDER L. STEVAS
CLERK

No. 82-963.

In the

Supreme Court of the United States.

OCTOBER TERM, 1983.

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

OSBORNE SHEPPARD,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

JOINT APPENDIX.

FRANCIS X. BELLOTTI,
Attorney General,
BARBARA A. H. SMITH,
Assistant Attorney General, Chief, Criminal Appellate Division,
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-2240
Attorneys for Petitioner

JOHN REINSTEIN,
Counsel of Record,
Civil Liberties Union of Massachusetts,
47 Winter Street,
Boston, Massachusetts 02108.
(617) 482-3170

NANCY GERTNER,
SILVERGLATE, GERTNER, BAKER & FINE,
88 Broad Street,
Boston, Massachusetts 02110.
(617) 542-6663
Attorneys for Respondent

PETITION FOR CERTIORARI FILED DECEMBER 4, 1982.
CERTIORARI GRANTED JUNE 27, 1983.

Appendix.

Table of Contents.

Docket entries	1a
Indictment	8a
Motion for evidentiary hearing	9a
Motion to suppress	10a
Affidavit of Osborne Sheppard	13a
Affidavit in support of application for search warrant	14a
Memorandum containing findings of fact and rulings of law re defendant's motion and amended motion to suppress	19a
Supreme Judicial Court Opinion	40a

Commonwealth vs. Osborne Sheppard,
alias James Howard, alias James Carter, alias Jimmy

NO. 026071

Offense: Murder — First Degree
Attorney: Peter M. Dowd 5-15-79 — 11-7-79 J. Herlihy,
307 V.F.W. Pkwy. — Appt. by Ct.
Chestnut Hill

Date of Filing

1979

May 14 Indictment returned.
Motion of the Commonwealth for warrant of arrest to issue — filed and allowed. Dwyer, J.
Warrant issued.
Copy of indictment and notice of the finding of indictment sent to the Chief Justice and Attorney General.
Copy of indictment with notice of finding of indictment and that it would be entered forthwith on docket of this Court sent by Clerk to Sheriff for services on defendant in Common Jail.

May 15 Brought into Court on a warrant.
Order of notice to prisoner of finding of indictment and entry on docket served on defendant by Sheriff filed.
Indictment read — pleads not guilty. Court orders defendant to recognize with double surety in the sum of $100,000.00.
Court orders defendant examined by the Court Clinic Psychiatrist as to competency to stand trial, criminal responsibility and to determine whether or not defendant is sexually dangerous. Case continued to

1979

May 15 May 25, 1979 for status report. Mittimus issued.
Dwyer, J. - P. Buckley, ADA - E. Goldberg, Court Reporter - P. Dowd, Attorney for defendant.

May 25 Brought into Court — Psychiatric report received from Court Clinic Psychiatrist filed. Pre-trial conference ordered for June 25, 1979.
Dwyer, J. - P. Buckley, ADA - E. Goldberg, Court Reporter - P. Dowd, Attorney for the defendant.

June 25 Case continued to June 29, 1979 for hearing.
Dwyer, J. - B. Dwyer, ADA - E. Goldberg, Court Reporter.

July 18 Brought into Court - pre-trial conference ordered for July 25, 1979, request of the defendant.
Ford, J. - P. Buckley, ADA - E. Goldberg, Court Reporter - P. Dowd, Attorney for the defendant.

July 25 Continued, by agreement, to November 5, 1979 for trial.
Ford, J. - B. Dwyer, ADA - E. Goldberg, Court Reporter - P. Dowd, Attorney for the defendant.

Nov. 7 Brought into Court - Hearing Re: Appointment of Attorney John Herlihy before Brogna, J.
Defendant's petition for Assignment of counsel filed and allowed.
Attorney Dowd withdrawn by leave of Court.
Affidavit of counsel, filed.
Attorney John F. Herlihy, Jr. appointed to represent the defendant in accordance with Rule 53 of Superior Court.
Continued generally by agreement.
Brogna, J. - P. Buckley, ADA - H. McKenna, Court Reporter - J. Herlihy,
Attorney for the defendant.

1979

Nov. 15 Defendant files: Motion for disclosure of identification procedure;
Motion to inspect witnesses' statements;
Motion of the defendant to be furnished with exculpatory evidence;
Motion for statements of defendant;
Motion for production of Police Department reports;
Motion for inspection of Grand Jury minutes;
Motion for list of names and addresses of witnesses who were summonsed to testify before the Grand Jury;
Motion to examine photographs;
Motion to be furnished with statements of promises, rewards or inducements;
Motion for copy of autopsy report.

1980

Jan. 23 Defendant not in Court - Pre-trial conference ordered for January 31, 1980, report to be filed 2:00 P.M. Morse, J. - P. Buckley, ADA - E. Goldberg, Court Reporter - J. Herlihy, Attorney for the defendant.

Jan. 31 Defendant not in Court - Pre-trial conference report ordered for February 15, 1980. Morse, J. - B. Dwyer, ADA - E. Goldberg, Court Reporter - J. Herlihy, attorney for the defendant.

Feb. 15 Pre-trial conference report filed.

Feb. 21 Defendant files: motion for permission to hire an investigator;
motion for evidentiary hearing;
motion to suppress with affidavit thereon.

June 16 Defendant's amended Motion to suppress and Memorandum in support each filed by leave of Court. Brogna, J.

1980

Aug. 14 Commonwealth's Motion for physical and Psychiatric Examination of the defendant is filed and allowed by agreement of all parties.

Defendant's Motion for continuance to the week of September 15, 1980 is filed and allowed. Brogna, J. -S. Needle, ADA - J. Herlihy, Attorney for defendant.

Sept. 15 Brought into Court, hearing in re: Defendant's Motion to suppress (Paper # 20) and defendant's amended Motion to suppress proceeds before Ronan, J.

Sept. 16 Brought into Court, hearing in re; defendant's Motion to suppress (Paper # 20) and defendant's amended Motion to suppress continued before Ronan, J.

Sept. 17 Brought into Court, hearing in re: Defendant's Motion to suppress (paper 20) and defendant's amended Motion to suppress continues before Ronan, J. Upon completion of hearing, the same is taken under advisement. Ronan, J. N. Flanagan, D.A. - H. McKenna, Court Reporter - J. Herlihy, attorney for defendant.

Sept. 26 Court file Memorandum containing Findings of Fact and Rulings of Law re; Defendant's Motion and amended Motion to suppress (copies given to D.A. and Attorney) Ronan, J.

Sept. 29 Brought into Court, trial date set for October 14, 1980 by agreement of all parties, no further continuances. Ronan, J. - N. Flanagan by C. Garrigan, ADA - J. Herlihy, Attorney for defendant.

Oct. 14 Brought into Court, Court files Certificate of Protracted Trial ordering a Jury of not exceeding (16) members be impanelled.

Defendant files Motion in Liminie. Voir Dire selection of Jury proceeds before Ronan, J. - H. McKenna, Court Reporter.

1980

Oct. 15 Brought into Court, Voir Dire selection of Jury continues before Ronan, J.
Selection of Jury is completed. Jury taken on view. H. McKenna, Court Reporter.

Oct. 16 Brought into Court, defendant's Motion In Liminie, filed on October 14, 1980 is denied. Sequestration of witnesses is ordered.
Trial proceeds before Ronan, J. and Jury of 16. H. McKenna, Court Reporter.

Oct. 17 Brought into Court, trial continues before Ronan, J. and jury of 16. H. McKenna, Court Reporter.

Oct. 20 Brought into Court, trial continues before Ronan, J. and jury of 16. H. McKenna, Court Reporter.

Oct. 21 Brought into Court, trial continues before Ronan, J. and jury of 16, H. McKenna, Court Reporter.

Oct. 22 Brought into Court, trial continues before Ronan, J. and jury of 16, H. McKenna, Court Reporter.

Oct. 23 Brought into Court, trial continues before Ronan, J. and jury of 16.
Commonwealth rests case-in-chief.
Defendant's Motion for Required Finding of Not Guilty is filed and denied.
Defendant's Motion for appropriate Relief is filed and taken under advisement. H. McKenna, Court Reporter.

Oct. 24 Brought into Court, trial continues before Ronan, J. and jury of 16.
Defendant's Motion for appropriate relief is denied. Defendant rests.
Court orders that the jury be reduced to (12) in number, and the names of; Alice G. Palmer, Joseph P. Geremonts, Carl W. McBraver, Abraham Gilman were drawn and designated as alternate jurors and

1980

Oct. 24 placed in the custody of the Court officers. Jury locked-up for the evening. H. McKenna, Court Reporter.

Oct. 25 Brought into Court - Jury continues its deliberation - Verdict Guilty - Verdict Affirmed - Verdict Slip filed.
Defendant sentenced to be imprisoned to M.C.I. Walpole, for and during the term of his Natural Life.
Defendant notified of right to appeal in accordance with Rule 65.
Defendant deemed to have served 511 days of this sentence.
Mittimus issued.
Ronan, J. - N. Flanagan, D.A. - H. McKenna, Court Reporter - J. Herlihy, Attorney for defendant.

Oct. 31 Defendant files: Notice of Appeal.

Nov. 6 Notice sent to Attorney that we are accepting Claim of Appeal as notice of appeal.
Copy of notice of appeal mailed to Ronan, J. and N. Flanagan, D.A.
Letter sent to Court Reporters E. Goldberg and H. McKenna for preparation of transcripts.
Certificate of Clerk filed.

Nov. 26 One original transcript of evidence delivered to Clerk by E. Goldberg, Court Reporter.

1981

Jan. 9 One original transcript of evidence on September 15, 16, 1980 delivered to Clerk by H. McKenna, Court Reporter.

Jan. 19 One original transcript of evidence on October 14, 15, 1980 delivered to Clerk by H. McKenna, Court Reporter.

1981

Mar. 10 One original transcript of evidence on October 20, 21, 1980 delivered to Clerk by H. McKenna, Court Reporter.

Mar. 24 One original transcript of evidence on October 22, 23, 1980 delivered to Clerk by H. McKenna, Court Reporter.

May 6 One original transcript of evidence on September 17, October 24 and 25, 1980 delivered to Clerk by H. McKenna, Court Reporter.

May 15 Notice sent to attorneys that transcripts are available.

May 18 Certificate of delivery of transcript by Clerk - filed.

May 19 Certificate of delivery of transcript by Clerk - filed.

May 21 Notice of completion of assembly of record sent to Clerk of Supreme Judicial Court and attorneys for Commonwealth and defendant.

Two certified copies of docket entries, original and copy of transcript, two copies of exhibit list and list of documents, each transmitted to Clerk of Appellate Court. Attorney Herlihy and Newman Flanagan, District Attorney, each notified.

Commonwealth of Massachusetts.

SUFFOLK, ss. At the SUPERIOR COURT DEPARTMENT of the TRIAL COURT, begun and holden at the City of Boston, within and for the County of Suffolk, for the transaction of criminal business, on the first Monday of May, in the year of our Lord one thousand nine hundred and seventy-nine.

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present that

OSBORNE SHEPPARD, otherwise known as JAMES HOWARD, otherwise known as JAMES CARTER, otherwise known as JIMMY, on the fifth day of May, in the year of our Lord one thousand nine hundred and seventy-nine, did assault and beat one Sandra D. Boulware, with intent to murder her, and by such assault and beating did kill and murder the said Sandra D. Boulware.

A TRUE BILL.

/s/_____ /s/_____

Assistant District Attorney. Foreman of the Grand Jury.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
NO. 026071

COMMONWEALTH)
)
VS.) MOTION FOR EVIDENTIARY
) HEARING
OSBORN SHEPARD)

Now comes the defendant and moves that this Honorable Court order an evidentiary hearing on the defendant's previously filed motion to suppress.

The defendant assigns as reason therefor, the relevance and necessity of laying a complete factual basis for the allegations contained in his motion to suppress; the facts and circumstances for the issuance of the warrant and the interrogation of the defendant require the taking of evidence as they are not apparent from the warrant or affidavit itself.

By his attorney:

/s/_____
John F. Herlihy, Jr.,
Herlihy, Russel & Foehl
11 Beacon Street
Boston, MA. 02108
Tel. No. 723-6030

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
NO. 026071

COMMONWEALTH)
)
VS.) MOTION TO SUPPRESS
)
OSBORN SHEPARD)

1. On May 5th, 1979, at approximately 5 A.M. the body of one later identified as Sandra Boulware was found in an open field in Roxbury.

2. In the course of the police investigation that followed, the defendant was picked up by certain Boston police officers that same afternoon. He was taken to District 2 and was interrogated for over an hour by Detective Sergeants Bornstein and Kelly.

3. At no time during this custodial interrogation was the defendant advised of his constitutional rights, although it was apparent that he was the primary suspect in the homicide of Sandra Boulware.

4. As a result of information learned by police during their lengthy interrogation of the defendant, a warrant to search his residence at 42 Deckard St., Roxbury, was issued the following afternoon on Sunday, May 6, 1979.

5. Pursuant to said warrant, the police entered upon and searched the premises at 42 Deckard St. in Roxbury. They conducted a wide-ranging search of the second-floor apartment and entire basement area of said premises.

6. The return filed upon the warrant discloses that numerous articles of various description were seized including,

1 navy blue mens jacket; 1 pr. mens black boots; 1 patch of hair; 1 piece of tile; 1 pr. mens jockey shorts; styrofoam cup; 1 piece of dirty cloth; 1 pr. womans blk. leotards; 1 piece insulated wire; 2 womans ear rings; odd pieces of cement with brn. stains; piece of paneling; pieces of paper with red stains; pieces of 3 different kinds of wire; a womans white right shoe; piece of rug; 1 book with tel. numbers; 1 multi-color cloth; 1 bed sheet; 5 ash trays; 1 brandy glass; 1 telephone.

WHEREFORE, the defendant says that he is aggrieved by the above described actions of the Boston police and contends that he was the victim of an unlawful search and seizure. More specifically, the defendant alleges that his rights have been violated in that:

(a) The warrant issued in this case is defective on its face for it clearly authorizes only the search for controlled substances or related paraphernalia.

(b) The warrant and application in support thereof fail to comport with the statutory requirements of Chapter 276 § 1 in that the warrant itself refers only to controlled substances and the application describing the articles sought is improper and overbroad.

(c) The warrant in this case is defective on its face because it fails to name and describe that person or person to whom authority for the search is given.

(d) The warrant in this case is defective on its face because it inaccurately, ambiguously, vaguely and overbroadly describes the exterior of the premises itself and that portion of the interior which is specifically contemplated in the search.

(e) The application and affidavit in support of the application contain material misstatements of fact and uncorroborated hearsay and fail to properly set forth probable cause.

(f) The affidavit submitted in support of the warrant relies for probable cause almost completely on statements given to the police by the defendant himself during a custodial interrogation. No attempt whatsoever was made by the police to inform the defendant, who was clearly a suspect, of his constitutional rights. Therefore, all information derived from this interrogation was illegally obtained.

Now comes the defendant and based on the foregoing says that any and all property seized pursuant to the above described warrant be either returned to him or suppressed as evidence against him in this or any other proceeding.

The defendant further says that any and all statements that he may have made, and which were taken down and used as a basis for the issuance of a search warrant, be suppressed as evidence against him in this or any other proceeding.

And finally that the search warrant, application and affidavit in support thereof be declared defective and invalid, because they were obtained in violation of the defendant's rights to be secure from unreasonable search and seizure as guaranteed by the 4th Amendment to the Constitution of the United States and Article XIV of the Declaration of Rights to the Constitution of the Commonwealth of Massachusetts.

By his attorney:

/s/_____

John F. Herlihy, Jr.,
Herlihy, Russell & Foehl
11 Beacon Street
Boston, MA. 02108
Tel. No. 723-6030

AFFIDAVIT

I, Osborn Shepard, the defendant in the above numbered indictment being duly sworn, depose and say that I have been the victim of an unlawful search and seizure and also the victim of an unlawful police interrogation in that I was not advised, at any time during said interrogation, of my constitutional rights. I have been informed that the items mentioned in the return on the warrant issued for the search of my residence, which I contend was illegal, are intended to be used against me at my trial.

Signed under the pains and penalties of perjury this day of February, 1980.

/s/ _____
Osborn Shepard

Commonwealth of Massachusetts.

DISTRICT COURT DEPARTMENT — ROXBURY DIVISION

SUFFOLK, ss.

AFFIDAVIT IN SUPPORT OF APPLICATION FOR SEARCH WARRANT

G.L. c. 276, §§ 1 to 7; St. 1964, c. 557

SUNDAY May 6, 1979

I, PETER J. O'MALLEY being duly sworn, depose and say:

Name of applicant

1. I am a detective, Boston Police Department, Attached to District Two

2. I have information based upon (describe sources, facts indicating reliability of source and nature of information; if based on personal knowledge and belief, so state) (if space is insufficient, attach affidavit or affidavits hereto). On Saturday 5/5/79 at 5:00 A.M. the body of Sandra D. Ware was found beaten and burned to death opp. 28 Hazelwood St. rox. In a vacant field. At the time she appeared to be only partially clothed. In the course of the investigation this followed. It was determined that one Osborne Sheppard 42 Deccard St. Rox. was the last person to have been seen with Sandra. In an interview gave to Sgt. Bornstein, O Sheppard stated that he and Sandra went to Deckard St. Rox. on 5/1/79, which is the last date she was seen. That prior to going there, they had stopped and bought 2 nickle bags of herb and a fifth of Ameretto liquor. Officers in this investigation have established that O. Sheppard was in possession of a 1975 blk. Ford Thunderbird, Mass. Reg. VLB PNB for a period of time, ending just before the body of Sandra was found and that this vehicle was found to have human blood on the rear bumper that wasn't there prior to his taken possession, also in the trunk of this car were found various pieces of wire and rope that may

have been used to bind parts of her body, pieces of wire he found on the body. O. Sheppard has told McKinnley Grimfs, a friend, that in the past he was taken woman friends to his cellar at 42 Deckard St. for social purposes, and has worked on the cellar to make it comfortable.

3. Based upon the foregoing reliable information — and upon my personal knowledge and belief — and attached affidavits — there is probable cause to believe that the property hereinafter described — has been stolen — or is being concealed, etc. and may be found in the possession of OSBORNE SHEPPARD at premises 2nd floor at 42 Deckard St. Roxbury

4. The property for which I seek the issuance of a search warrant is the following (here describe the property as particularly as possible). A fifth bottle of Ameretto Liquor, 2 nickle bags of marijuana, a womans jacket that has been described as black-grey (charcoal) possessions of Sandra D. Boulware, similar type wire and rope that match on the body of Sandra D. Boulware, or in the above thunderbird. Blunt instrument that might have been used on the victim. Mens or Womans clothing that may have blood, gasoline, burns on them. Items that may have fingerprints of the victim.

WHEREFORE, I respectfully request that the court issue a warrant and order of seizure, authorizing the search of (identify premises and the person or persons to be searched) The second floor at 42 Deckard St. Rox. and that part of the cellar controlled by Osborne Sheppard. 42 Deckard St. is a three story red brick apartment building with a basement that is attached to yellow & similalr structures on both sides. and directing that if such property or evidence or any part thereof be found that it be seized and brought before the court; together with such other and further relief that the court may deem proper.

/s/_____

Peter J. O'Malley

Signature of Applicant

Then personally appeared the above named Peter J. O'Malley and made oath that the foregoing affidavit by him subscribed is true.

Before me: clerk: /s/ Josepth F. Feeney

Mass. Trial Court

SUFFOLK, ss. City of Boston, May 6 1979.

By virtue of the within warrant I have this day entered and searched the within-described premises, and then and there found and seized 1 navy blue mens jacket, 1 pr. mens black boots * 1 patch of hair * 1 piece of tile * 1 pr. mens jockey shorts * styrofoam cup * 1 piece of dirty cloth * 1 pr womans blk leotards * 1 piece insulated wire * 2 womans ear rings * odd pieces of cement with brn stains * piece of paneling * pieces of paper with red stains * pieces of 3 different kinds of wire * a womans white right shoe * piece of rug * 1 book with tel. numbers * 1 multi color throw cloth * 1 bed sheet * 5 ash trays * 1 brandy glass * 1 telephone and all of said items are now before said Court to be dealt with according to law.

/s/ Lewis McCoulsey Police Officer.

197 No. 96

Roxbury Division
DORCHESTER DISTRICT (crossed out)
Mass. Trial Court.

COMMONWEALTH
on complaint of

SEARCH WARRANT.
Controlled Substance (Xed out)
G.L.C. 276 Sec. 2 thru 3A

To the Justices of the Municipal Court of the Roxbury District, holden in said Dorchester District for the transaction of criminal business within the County of Suffolk:

of Boston

in the County of Suffolk, Police Officer, on oath informs the said Court, that he has reason to believe that any controlled substance, article, implement or other paraphernalia used in, for, or in connection with the unlawful possession or use of any controlled substance, is kept or deposited by OSBORNE SHEPPARD *some person or persons unknown to the said* _____ in certain rooms in the 2nd & basement story of the building situated and numbered 42 in Deckard St., street in said city and within the judicial district of said Court and prays a Warrant to search there for the same.

RECEIVED and sworn to before this Court, this 6th day of May in the year of our Lord one thousand nine hundred and seventy Nine.

Clerk.

Commonwealth of Massachusetts

SUFFOLK, TO WIT:

To the Sheriff of our County of Suffolk, his Deputies, and the Constables and Police Officers of the City of Boston in said County: Greeting.

WE COMMAND YOU, and each of you forthwith, with necessary and proper assistants, to enter in the day time or in the night time in the _____ mentioned in the above information, and there diligently to search for any controlled substance, article, implement or other paraphernalia used in,

for, or in connection with the unlawful possession or use of any controlled substance, and to seize and securely keep the same until final action, and to arrest the person or persons in whose possession it is found, together with all persons present if any of the aforesaid substances is found, and bring them before said Court to be dealt with according to law, and return this warrant with your doings thereon.

You are also commanded, in like manner, to notify the informant to appear and give evidence touching the matter contained in the above complaint, when and where you have the said substances and persons or either of them.

WITNESS, Joseph F. Feeney, Esquire, at Boston, in said Roxbury Division Mass. Trial Court, this sixth day of May in the year of our Lord one thousand nine hundred and seventy nine.

/s/ Joseph F. Feeney
Trial Justice, Mass. Trial Court

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
NO. 026071

COMMONWEALTH	) MEMORANDUM CONTAINING FIND-
	) INGS OF FACT AND RULINGS OF LAW
VS.	) RE DEFENDANT'S MOTION AND
	) AMENDED MOTION TO SUPPRESS
OSBORNE SHEPPARD	)

. . . . . .

Statement of the Case

The defendant Osborne Sheppard awaits trial upon the above numbered indictment which presents murder in the first degree. Presently, the defendant urges both a Motion to Suppress physical evidence which was filed on February 21, 1980 and an "Amended Motion" seeking suppression of certain oral statements allegedly made by him during a claimed custodial inquiry on May 5, 1979. The grounds advanced for the suppression of the physical evidence are that the items that were seized were taken pursuant to the authority of a search warrant that both as to form and content is so defective as to be a nullity; and, alternatively that an examination of the affidavit supporting its issuance reveals a lack of probable cause. With respect to the arguments advanced for suppression of the oral statements, the grounds relied upon are a failure to comply with the requirement of Miranda in that an alleged custodial interrogation without a prior constitutional advices of rights was had and, in any event, that interrogation was a detention

offensive to the fourth amendment under the rationale of *Dunaway* v. *New York*, ____ U.S. ____ (1979).

Findings of Fact

1. As of May 5, 1979 there had been multiple homicides that had occurred in the Roxbury section of Boston. There had been ten or eleven young black female victims murdered in the span of approximately four months. These incidents were understandably a matter of extreme community interest. The events received considerable newspaper attention and other public coverage. In response to these several concerns, the Boston Police had placed its District 2 detective personnel on double shifts and, or, overtime in an attempt to discover the perpetrators of these crimes and thereby restore peace and order to the community.

2. In the early morning hours of May 5, 1979 (sometime at or about 5 A.M.) the body of the tenth (or eleventh) victim was discovered in a vacant lot within Roxbury. The body had been burned and the responding officers observed a patch of material and a length of wire attached to the leg of the corpse. The Police Commissioner, one Jordan, and the District 2 detectives gathered at the scene before 6 A.M.

3. An intensive police effort commenced. First attempts were made to identify the visibly unrecognizable body. A detective Montgomery began knocking on neighborhood doors to discover whether nearby residents had observed anything. Later, he was furnished with a photograph of a woman who, police thought, might possibly have been the victim. Montgomery started asking questions in various local establishments seeking to find anyone who might recognize the woman in the photograph. While making this routine inquiry within a bar, a patron approached and related that the woman depicted was acquainted with his girlfriend. After being unable to

reach this person on the telephone, Montgomery went to the address furnished by the patron only to learn that other police had already contacted her and that she was then at the police station.

4. At some time around midday, Sgt. Albert Bornstein, Chief of District 2 detectives summonsed all teams working on the homicide to a briefing session. Bornstein informed the collected detectives that the victim was thought to be a Sandra Boulware, that a positive identification of the body had been obtained, and, among other things, that Bornstein wanted to interview one "Jimmy Sheppard" who might have been a boyfriend of the deceased. Montgomery knew Sheppard from prior contacts with him. He knew him as a gambler, a so-called "gaming man". Montgomery and his partner cruised the neighborhood, looking for a red and black automobile which Montgomery thought was owned by Sheppard. He looked around the general area of several locations where he thought he might find him (even passing by 158 Whitfield Street). At approximately 5 or 6 P.M. he decided to enter the Whitfield Street premises notwithstanding the fact that there was no red and black car to be seen in the area.

5. Montgomery, accompanied by his partner Brad Jones, knocked on the door which was opened by the defendant. Montgomery spoke first. "Jimmie, you're just the fellow I am looking for", to which Sheppard responded either "Well, you're looking at me" or "Are you looking for me?" Montgomery then gave him the reason. Sgt. Bornstein wanted to ask him, Sheppard, some questions and requested he come to the station. The defendant replied, "Let me get my coat". He went from the first floor to the second. Montgomery also went upstairs. The card players were gathering there. Montgomery moved to relieve any anxiety and told them that his visit wasn't a gaming raid and that he wasn't interested in them. Sheppard had retrieved his coat by this time and the two left.

When they got outside Montgomery did not (contrary to the defendant's contention) handcuff him or ride with him in the back seat. Montgomery who rode in the front passenger seat took out his Miranda card and read it to Sheppard who was seated alone in the back of the unmarked automobile.

6. I find that at this time Sheppard was well aware of his constitutional rights. He was fifty-five years of age. He had considerable prior experience with police officers and police investigations. On May 5, 1979, prior to Montgomery's recital, Sheppard well knew he had a constitutional right to remain silent, that anything he said could be used against him, that he had a right to a lawyer, and that if arrested he had a right to use the telephone. He was alert and not under the influence of any narcotic or alcohol. Perhaps it should be noted he was about to act as a dealer in a card game with "gaming men" hardly a casual activity where mental dullness or lack of alertness is long tolerated. Montgomery commenced to ask Sheppard about his whereabouts on the morning of May 5, 1979. Sheppard who has described himself as rather "well read and well versed" and certainly who is intelligent and articulate, asked what it was all about. Montgomery replied, "Do you know Sandra Boulware" to which Sheppard affirmatively responded. Montgomery stated, "She is no longer with us".

Montgomery inquired at considerable length of Sheppard, all as more fully appears from Exhibits 16 and 17, while traveling from Whitfield Street to the police station. This court finds that Sheppard was well aware of the extent and scope of his rights and having just been re-informed by Montgomery decided to respond and answer questions. He knew that the police were investigating the death of Sandra Boulware and were interested in exploring his relationship with her and in determining his whereabouts and activities at least on May 4 and May 5, 1979. He had been arrested on previous

occasions. He knew that he was not in custody. He fully understood each, every and all options open to him. His will had not been overborne. He made a rational, strategic decision. He had not been intimidated, and his waiver was voluntary.

7. When Sheppard arrived at the station, Montgomery brought him to Bornstein's office and introduced them. Bornstein told him he was investigating the homicide of Sandra Boulware and wanted to interview him. Sheppard agreed. He noticed that Bornstein had an additional black police officer come into the room. Sheppard thought that Bornstein was "diplomatic" to do so since it meant that three black and three white officers were then present. Bornstein asked if he could interview Sheppard on tape. Sheppard agreed. Since Bornstein's investigation had not focused upon Sheppard and since he considered Sheppard's visit to be voluntary, he did not repeat the Miranda warnings given earlier by Montgomery.

On the tape Sheppard has a deep, rich baritone voice that presents some audible amplification difficulties. However, his voice and vocal demeanor are cool, reflective and calm. His answers were coherent and directly responsive to the questions as posed. Sometimes his answers were cryptic, but often, after a reflective pause, he voluntarily enlarged upon the same. Sometimes he made unsolicited observations. The tape is without a trace of confusion, intimidation, anxiety or uncertainty. On the contrary the vocal impression gleaned from the tape is that of a speaker in full, firm, patient and collected demeanor and in an easy fluid manner making clear and lucid responses to the inquiries put. Sheppard knew that he had a right to decline to be interviewed. He also knew that any answer given could later be used against him. He well knew he could secure the service of a lawyer prior to any questioning. He had past familiarity with arrest and booking procedures. Notwithstanding his presence within a police station, he was under no coercive, or harassing influence. His

decision was unfettered and free. He decided to be interviewed and on tape. It is apparent from the same tape that he was comfortable and confident with his decision during the recording that followed. He depicted himself as one who knew that he hadn't done anything wrong.

8. When the interview was concluded Bornstein thanked Sheppard for his cooperation and the defendant left. Perhaps it should be noted that the victim had another boyfriend whose possible information was of some initial interest to the investigators.

9. The police continued their investigatory efforts and as a part of that effort, interviewed, among others, Elbert Robinson, Finley Robinson, a cook by the name of Howard Druger, the defendant's brother and sister-in-law, and a Philip Barros. The information solicited contradicted in many particulars the information furnished earlier by Sheppard. The investigation quickly began to focus upon the defendant.

10. The police had secured information that Sheppard had borrowed an automobile, a black "T-Bird" of an unknown year from Barros and was in possession of it between 3:00 A.M. and 5:00 A.M. on May 5, 1979. When the police found Barros, they asked him to inspect the vehicle. Stains were observed. A chemist, called for the purpose, determined these stains were human blood stains. These were found both upon the rear bumper and within the trunk compartment. Also found within the trunk were certain strands of wire. Barros told Detective Peter J. O'Malley that when he last used the car on Friday night he had placed a box of apples in the trunk and that there no stains in the trunk or on the bumper at that time. This was shortly before he let Jimmy Sheppard use the car. The car inspection and the interview with Barros took place sometime on Sunday morning.

11. Therefore, at about noontime on Sunday, May 6, 1979 Detective O'Malley drafted the affidavit that is now Exhibit

No. 2 herein. The affidavit was intended to support his subsequent application for a search warrant so as to permit the inspection of the premises occupied by Osborne Sheppard, upon the second floor of 42 Deckard Street, Roxbury, where the defendant lived with his mother and sister, and that portion of the cellar which the defendant controlled or utilized in connection with a playroom or recreation room, in which, upon information furnished, the police believed that from time to time he entertained "women friends . . . for social purposes . . .". When he had completed the affidavit, Detective O'Malley showed it to the first assistant District Attorney for Suffolk County and asked him to advise him as to its sufficiency. He was advised the affidavit set forth probable cause to support the issuance of a search warrant.

12. Because it was Sunday, there was neither immediate nor ready access to the courts. Although the District 2 Police Station is in close proximity to the Roxbury District Court, Detective O'Malley was informed that four attempts to contact either the clerk or assistant clerks were unsuccessful. In any event, Detective O'Malley and others searched the station and attempted to find a suitable form of search warrant. Finally, from somewhere, they secured a form previously in use at "Dorchester District" entitled "Search Warrant", subtitled "Controlled Substance G.L. c. 276 §§ 1 through 3A." This search warrant, as subsequently issued, appears as Exhibit 1 herein.

Detective O'Malley was aware that the form of warrant found related to searches for controlled substances and needed to be adapted for his intended use. Therefore, he deleted the subtitle "controlled substance" with a typewriter.

13. Meanwhile, arrangements had been made so Detective O'Malley might present his affidavit before a justice whose residence was in nearby West Roxbury. This judge had consented to affording the police an opportunity to be heard im-

mediately at his home. Detective O'Malley therefore made certain typed changes in the warrant form, as seen upon Exhibit 1. In that portion which comprises the complaint, he substituted "Roxbury" for the printed "Dorchester", and further typed in the name of "Osborne Sheppard" where a blank space was afforded for use in identifying the "keeper" or "depositor" of the controlled substance that the form as printed contemplated. Further, the detective typed in "2nd & basement" in a blank space provided for place; sought to be searched; also "42 Deckard St." in the blank space provided for a specification of the premises.

14. This court finds that the police had a legitimate reason and need for proceeding with all due dispatch. The defendant, who was at liberty, customarily arose at midday. He spent his later afternoons and early evenings in the company of gaming men; and, indeed, with some of the persons whom the police had questioned after his recorded interview. It was probable that the defendant would, within hours, learn of the police discoveries, including their observations of the vehicle. Since the items the police sought, as set forth in O'Malley's affidavit, were all small, light, susceptible of easy destruction or quickly transportable, and, if they existed, were in an area in which the defendant had instant and private access, it was reasonable to anticipate an attempt to rid or remove any telltale articles. It was because of this urgency that the police were moving with dispatch.

15. Detective O'Malley arrived at the issuing magistrate's home on Sunday afternoon. He presented his affidavit and made oath as to its contents and signed it before that judicial officer. The Justice acknowledged the same and signed his name, all as presently appears on Exhibit No. 2. I find as a fact that the Justice concluded upon the affidavit that there was probable cause to order the search of the second floor premises occupied by Sheppard and that part of the cellar used

either as a playroom or which was controlled by him. I further find that the Judge stated he would authorize the search as requested. Detective O'Malley offered the form and stated that he knew the form as presented dealt with controlled substances. He showed the Judge where he had crossed out the subtitles. He asked the Judge if this form of the warrant could be adapted so as to provide authorization for the search requested. I find that the Judge stated to Detective O'Malley that he would make the necessary changes so as to provide a suitable form of search warrant. Whereupon, on the back of the warrant the Judge crossed out with a pen "Dorchester District" and wrote in "Roxbury Division, Mass. Trial Court". With respect to the command of the warrant, the judge crossed out with pen the name of the judge and judicial district as it appeared in print and substituted thereof his own name and "Mass. Trial Court, Roxbury Division" in his own handwriting. Thereafter, he dated the warrant, signed it and delivered it to Detective O'Malley. Also, he gave the affidavit back to Detective O'Malley without making in the warrant any other alterations or additions. I find, as a fact, as a reasonable inference that may be drawn from the evidence presented, that the issuing magistrate considered that portion of the form furnished which appears immediately above the command of the warrant and which was a form provided for a clerk's attestation of the fact a complaint had been made, as an integral part of the process he was then issuing. He informed Detective O'Malley that the warrant as delivered over was sufficient authority in form and content to carry out the search as requested.[1] Detective O'Malley then left the magistrate's home.

16. Thereafter, the search warrant was executed by a group of officers under the direction of Detective O'Malley.

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[1] Detective O'Malley also sought and secured an arrest warrant after he had been examined under oath by the same magistrate. No issue regarding the arrest warrant has been raised.

Sheppard was not home. The premises of the second floor apartment which was occupied by the defendant and the playroom in the cellar were searched. The search was had and accomplished within the limits that Detective O'Malley understood the warrant to permit. I find that O'Malley had the affidavit as well as the search warrant with him. The warrant was peacefully executed. The defendant's mother and sister were present at the time. O'Malley orally informed them of the fact that he had a warrant authorizing the search of the second floor premises and cellar area occupied by the defendant. There was no evidence that either occupant asked to see it or that it was read spontaneously to them.

17. Sheppard's bedroom was searched and certain items seized. When police entered into the cellar playroom area, they observed an open door leading into an adjacent unfinished area. The door was open. The door frame had a device which permitted it to be secured from within the playroom. There was no evidence of any other means of access to that area other than through the playroom. The police entered and searched the playroom. At or near the open door was a scatter rug containing blood stains. At or near the door opening were pieces of cement showing apparent blood stains. In the unfinished area most proximate to the door police observed women's earrings. Other articles, such as articles of clothing and wire, were found in a depression in this cellar area. I find this cellar area to be an area under the control of Sheppard. It was about fifteen feet from the door. I find that the search was within the limits that O'Malley understood the warrant to permit.

18. After the search was accomplished, O'Malley and one McConkey inventoried the items seized. (One of the items inventoried was a bed sheet which was removed from a trash barrel found outside the dwelling.) O'Malley made his return to the Roxbury Court on Monday morning.

Rulings of Law

With respect to the tangible articles seized by the police on May 6, 1979 from the second floor bedroom of Osborne Sheppard and the cellar area, there are two contentions advanced.

The initial contention considered is that the affidavit fails to establish probable cause. This argument is without merit. First, the law is settled that the affidavit shall be read in a commonsense fashion and precision of language is not required. *United States* v. *Ventresca*, 380 U.S. 102, 108-109 (1965). Massachusetts has followed the federal lead holding that the contents will not be first dissected so that each resulting fragment shall be subjected to a hypertechnical test of its sufficiency standing alone. *Commonwealth* v. *Steward*, 358 Mass. 747, 751. Nor should the affidavit be reviewed from the point of view of a common law pleader. *Commonwealth* v. *Pellier*, 362 Mass. 621 (1972). Indeed, if police are to be encouraged, it seems good policy to allow a certain leeway or leniency in the after-the-fact review of the application's sufficiency. *Commonwealth* v. *Corradino*, 368 Mass. 411, 416 (1975).

Of course, the same Fourth Amendment standard of probable cause is applicable to a search as it applies to arrest and this standard was acknowledged in *Commonwealth* v. *Stevens*, 362 Mass. 24 (1972) and restated in *Commonwealth* v. *Tarver*, 369 Mass. 302 (1975) and most recently in *Commonwealth* v. *Cefalo*, Mass. Adv. Sh. (1980) 1875, 1885-1886.

Probable cause must be shown within the affidavit without resort to extraneous evidence. By way of definition, probable cause exists wherever the facts and circumstances within the knowledge of the government and of which it had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed. *Carroll* v. *United States*, 267 U.S.

182 (1925), *Beck* v. *Ohio*, 379 U.S. 89, 91 (1964). Massachusetts has used the phrase "prudent man" when discussing the sufficiency of the knowledge necessary. *Commonwealth* v. *Miller*, 366 Mass. 387 (1974). Also, the issuing judge has a right to draw inferences from the affidavit. *Commonwealth* v. *Moran*, 353 Mass. 166, 170.

Suffice to say that a review of the affidavit at issue showed that ample facts were averred which would support a reasonable belief in a prudent man that this defendant had committed murder. He was the last person who was known to have been in the company of the victim. The contact was within five days of the discovery of the victim. The place was in Roxbury which was where the body was found. The defendant operated a borrowed vehicle in Roxbury at a time just before the body was discovered. Upon visual inspection within a day and one-half of the discovery of the body, blood stains were found upon that car and those stains were not present immediately before the defendant borrowed the car. Also, the inspection revealed rope and wire in the car and the deceased was found with wire wrapped about her person. In sum, the averments are sufficient to permit a man of reasonable caution to believe that it was probable that the crime of murder had been committed and that there was probable cause to believe this defendant to be the perpetrator.

The next issue is the validity of the warrant. The Commonwealth seeks to justify the search as one which was effected by a warrant valid on its face.

The language of the Fourth Amendment is clear and requires that "No warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Article XIV of the Declaration of Rights to the Massachusetts Constitution requires that the warrant contain ". . . a special designation of the persons or objects of search arrest or seizure . . . with the formalities prescribed by the

laws." Therefore, as has been often said, "nothing is left to the discretion of the officer executing the warrant." *Marron* v. *United States*, 275 U.S. 191, 196; see also *Commonwealth* v. *Wojcik*, 358 Mass. 623, 625 (1971).

A search warrant which described the property in greater detail than the affidavit has been upheld. *Commonwealth* v. *Cuddy*, 353 Mass. 305, 309 (1967). A search warrant may be read with the complaint where it is attached to the warrant to provide sufficiency of description of the place to be searched. *Commonwealth* v. *Pope*, 354 Mass. 625, 629 (1968). Further, there are circumstances where it is permissive that the affidavit and warrant may be read together. In *Commonwealth* v. *Todesco*, 363 Mass. 445 (1973), the affidavit was attached to the warrant and the warrant made specific reference to the affidavit. It was held the requirement of specificity could be met by a reading of both. A wiretap warrant whichomitted the fifteen-day limit was considered valid since the warrant could be read in conjunction with the application which sought the fifteen-day authority. *Commonwealth* v. *Vitello*, 367 Mass. 224, 271-272 (1975). In that case it was thought significant that the police officer who made the affidavit was involved in the execution of the warrant. This was because he could be deemed to be aware of the limitations on the warrant. Moreover, an inadequate or ambiguous warrant description has been deemed sufficient by a reading of the affidavit and by the fact of "the knowledge of the officers on the scene". *Commonwealth* v. *Rugaber*, 369 Mass. 765, 769 (1976). It has most recently been suggested that the affidavit may be read along with the warrant to establish sufficiency of description even without physical attachment but where there was accompaniment. *Commonwealth* v. *Taylor*, Mass. App. Ct. Adv. Sh. (1980) 1653, 1657.

The argument of the Commonwealth fails to be persuasive. There are similarities between the case at bar and *Common-*

wealth v. *Vitello, supra*, in that the omissions from the wiretap were found by the trial judge to be as a result of "error and inadvertence" just as this court has found the omissions in the warrant to be inadvertent and in error. Likewise the officer executing the warrant in this case was the affiant and he possessed the unattached but accompanying affidavit. The reason the government's contention fails is that in every case in which a document has been utilized for the purposes of providing the requisite particularity, the basis has been that the warrant has used some suitable terms of reference which have supported the incorporation of the document. This has been plainly stated in the federal circuit which includes Massachusetts. *Application of Lafayette Academy, Inc.*, 610 F.2d 1 (1st Cir. 1979); *United States* v. *Klein*, 565 F.2d 183 (1st Cir. 1977). Furthermore, although not necessary to the holding, this principle has been approvingly articulated in *Commonwealth* v. *Accaputo*, Mass. Adv. Sh. (1980) 1009, 1019.

Therefore, the warrant at issue is fatally defective. The remaining issue becomes whether or not given the circumstances of this case the exclusionary rule should not be applied.

An examination of this judicial creation may be helpful. In contrast to the Fifth Amendment's direct command against the admission of compelled testimony the issue of admissibility of evidence obtained in violation of the Fourth Amendment is determined after, and apart from, the violation. Until 1914 there was no barrier to the introduction in criminal trials of evidence obtained in violation of the Amendment. *Adams* v. *New York* 192 U.S. 585 (1904), *Commonwealth* v. *Dana* 2 Metcalf 329, 337 (1841). In *Weeks* v. *United States* 232 05383 (1914) it was held that the Fourth Amendment alone may be a basis of excluding evidence at a federal criminal trial of evidence illegally seized by a federal officer. The *Weeks* holding, however, did not apply to state officers and material unconstitutionally seized by a state officer could be admitted

in a federal criminal proceeding. This became known as the "silver platter" doctrine. *Lustig* v. *United States*, 338 U.S. 74, 78-79 (1949). Thirty-five years after *Weeks*, the right to be free from arbitrary intrusion that is protected by the Fourth Amendment is "implicit in the concept of ordered liberty and as such enforceable against the states through the [Fourteenth Amendment] "Due Process Clause." *Wolf* v. *Colorado* 338 US 25, 27-28 (1949). The *Wolf* court however did not impose the *Weeks* exclusionary rule upon the states "as an essential ingredient of that right." See *Wolf supra* at 29. The test became whether the means used by a state were sufficiently offensive to the concept of ordered liberty as to make the admission of the evidence a violation of the Due Process Clause. *Rochin* v. *California* 342 US 165 (1952), *Irvine* v. *California* 347 US 128 (1954).

Thus as matters stood throughout most of the nineteen-fifties, the Fourth Amendment was applicable to the states, but a state could allow an official to engage in a violation thereof and, except in the most extreme case, avoid judicial sanction. To compound the problem, federal authorities, if they happened upon a state so inclined could profit from the state's action by receiving the unconstitutionally obtained evidence on the silver platter. Therefore, in retrospect, it was not surprising that in 1960 the Supreme Court exercised its "supervisory power over the administration of criminal justice in the federal courts" and barred from federal trials evidence improperly seized by state officers. *Elkins* v. *United States* 364 US 206, 216 (1960).

One year later the exclusionary rule was made applicable to state criminal trials *Mapp* v. *Ohio* 367 US 643, 655 (1961). The *Mapp* majority justified the application of the rule to the states on several grounds (i.e. prevention of introduction of evidence where the introduction is tantamount to a coerced confession; deterrence of Fourth Amendment violations; preservation of

judicial integrity) but principally upon the proposition that exclusion would deter future unlawful police conduct.

The debate within the Court upon the exclusionary rule has been considerable. However, it is clear and plain that the contention that the exclusionary rule is somehow coextensive with the Fourth Amendment is simply inaccurate and false.

> "In sum the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect rather than a personal constitutional right of the party aggrieved".
> *United States* v. *Calandra* 414 US 338, 348 (1974).

Because the exclusionary rule is "strong medicine" care should be had in prescribing it for all ills and the majority of the Supreme Court has exercised caution. Early on, the Court developed standing requirements in a balancing process between two competing social concerns, "the interest that the public has in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth", *Alderman* v. *United States* 394 US 165, 174-175 (1969) as against the particular individual's right not to be the subject of an arbitrary intrusion upon his person or private effects, *Brown* v. *United States*, 411 US 223 (1973). To state it another way, in deciding whether or not the exclusionary rule shall be applied, one first must recognize that the policies behind the rule are not absolute but relative. There is a balancing to be had between the strong public interest in truth at trial on the one hand, and an incremental contribution to the protection of Fourth Amendment or Fifth Amendment values. Therefore, although there is some dispute among the individual judges as to where the line should be drawn, the great majority of the Justices employ this reasoning

or balancing procedure and the results are easily understandable even if disputed. Cases clearly illustrate this process. *Harris* v. *New York* 401 US 222 (1971); *United States* v. *Calandra* 414 U.S. 338 (1974); *Michigan* v. *Tucker* 417 US 433 (1974); *United States* v. *Peltier* 422 US 531 (1975); *United States* v. *Jones* 428 US 433 (1976); *Stone* v. *Powell* 428 US 465 (1976); *United States* v. *Ceccelini* 435 US 268 (1978); *Rakas* v. *Illinois* 439 U.S. 128 (1978); *United States* v. *Caceres* 440 US 741 (1979); *Michigan* v. *DiFillipo* 443 US 31 (1979), and, *Yberra* v. *Illinois* ____ U.S. ____ (1979).

The nineteen-seventies has been a time wherein the Supreme Court has been establishing the parameters of the exclusionary rule which it judicially earlier fashioned and made applicable to the states in the nineteen-sixties.

In this case the police sought a warrant. The affidavit was submitted to an official from the District Attorney's office for a determination as to its adequacy from the point of view of probable cause. There was proper presentment to a magistrate. There was an independent assessment of that disinterested judicial officer that there was probable cause to search. The police had adequately described with constitutional specificity the places to be searched and the items to be seized. The police presented a form which was the only form of warrant available to them. The magistrate said he could adopt it. Thereafter the actual search undertaken was within the limits of the authority the police thought reasonably had been granted.

The Commonwealth in this case places great emphasis on *United States* v. *Williams* ____ F2 ____ (5th Cir. 1980) in which there appears a well reasoned justification for a good faith exception to the application of the exclusionary rule. The case is persuasive. However, of even greater weight is *Commonwealth* v. *Rugaber* 369 Mass. 765 (1976). In a situation where law enforcement officials acted mistakenly but upon

probable cause and in good faith and which presented a factual situation in which exclusion would have no deterrent effect stated:

> In these circumstances we agree with the judge who ruled that even if the warrant was defective, the exclusionary rule should not be applied since it could have no deterrent effect.
> *Commonwealth* v. *Rugaber, supra* at 769.

Likewise in this case, if police officers undertake their duties properly, they will act in the same fashion in similar circumstances in the future and the only consequence of applying the exclusionary rule would be to keep from the jury probative evidence and thereby impair the truth finding function.

Therefore, the evidence seized in this case is admissive notwithstanding any defect in the warrant.

Based upon the facts found above, this court now rules that the statements made on May 5, 1979 at the District 2 Police Station were freely and voluntarily made.

Miranda warnings must precede police questioning whenever that person is "deprived of his freedom of action in any significant way." *Miranda* v. *Arizona*, 384 U.S. 436, 444 (1966). Suffice to say this court has found as a fact that the defendant was afforded his Miranda warnings by Montgomery before any police interrogation was had.

Therefore the issue is whether or not there was a knowledgeable waiver.

In reference to Miranda issues, trial courts must indulge every reasonable presumption against waiver of fundamental constitutional rights. *Johnson* v. *Zerbst*, 304 U.S. 458, 464. The determination of whether there has been an intelligent waiver depends in each case upon the particular circumstances

and facts of the matter, including the background, experience and conduct of the defendant. The Commonwealth has a "very special and heavy burden" of showing the defendant knowingly and intelligently waived his right to silence and counsel. *Commonwealth* v. *Cain*, 361 Mass. 224 (1972). Station house inquiry, since it is generally most conducive to successful inquiry, is particularly scrutinized. *Commonwealth* v. *Hass*, 373 Mass. 545 (1977).

In reference to voluntariness, certain facts are obvious. The defendant was talkative from the outset. He was not misled. The questioning was not unduly long and he was not subjected to lengthy inquiry. He did not seek access to any friend, family or counsel. He did not indicate any physical or mental ailment. Sheppard was fifty-five years of age and had prior experience with police practices sufficient to understand his position. He was not overawed. He was not intimidated. The essence of the ability to make a voluntary statement is the ability to make a free choice. In short, the statement must be the product of a free will. *Eisen* v. *Picard*, 452 F.2d 860. Sheppard's self-preservation mechanism was operative. *Pia* v. *United States*, 397 F.2d 627, 634. This court finds that the statements made were the product of a rational intellect. Sheppard made the election to talk rather than exercise his right to silence. It was a strategic decision to present himself as a man with nothing to hide.

Many of the cases upon which this court relies were recently collected in *Commonwealth* v. *Mahnke*, 368 Mass. 662, 699-700 (1975) and there is no reason to set them forth herein.

This court concludes the statements made on May 5, 1979 by the defendant were made after a knowing and voluntary waiver of his Miranda rights.

Conclusion

The Motion to Suppress and the Amended Motion to Suppress are to be endorsed as follows: "The within motion be and hereby is denied for reason of findings made and rulings set forth in a memorandum of this date filed herewith."

/ s / _____
John T. Ronan
Justice of the Superior Court

September 26, 1980

1982

3-8	Cassette and Transcript of statement by defendant to Police.
4-9	Waiver of 120-Day Rule. Notice to counsel.
7-1	Letter to Mr. Sheppard, acknowledging his of June 29th concerning opinion from SJC.
10-26	The judgment is reversed and the verdict is set aside. Rescript October 26, 1982 Reasons as on file. Notice to counsel.
11-3	Motion of Commonwealth to stay issuance of rescript. ALLOWED by the Court 11-22-82.
12-17	Notice received from the Supreme Court of the United States of the filing of Petition for Certiorari (82-963) on 12/8/82.

COMMONWEALTH vs. OSBORNE SHEPPARD.

Suffolk. December 8, 1981. — October 26, 1982.

Present: HENNESSEY, C.J., WILKINS, LIACOS, ABRAMS, LYNCH, & O'CONNOR, JJ.

Search and Seizure. Evidence, Admissions and confessions. *Constitutional Law,* Search and seizure, Admissions and confessions.

At a criminal trial no error appeared in the denial of the defendant's motion to suppress statements made by him during a noncustodial interview at a police station, at a time when the police investigation had not yet focused on the defendant. [ ]

The exclusionary rule as enunciated by the Supreme Court of the United States required suppression of incriminating evidence obtained in the course of a police search conducted in good faith and pursuant to a warrant which had been issued on probable cause but which, as the result of negligence by the issuing magistrate, violated the constitutional and statutory requirement that search warrants describe the articles to be seized, and where the affidavit which had been presented to the magistrate, and which did describe the objects of the search, was neither attached to the warrant nor referred to therein. [ ] LIACOS and ABRAMS, JJ., concurring. LYNCH, J., dissenting.

INDICTMENT found and returned in the Superior Court Department on May 14, 1979.

Pretrial motions to suppress evidence were heard by *Ronan,* J., and the case was tried before him.

John F. Herlihy, Jr., for the defendant.

Newman A. Flanagan, District Attorney (*Clyde R. W. Garrigan,* Assistant District Attorney, with him) for the Commonwealth.

WILKINS, J. In this appeal from a conviction of murder in the first degree, we are faced with the serious and challenging question whether the exclusionary rule, adopted by the Supreme Court of the United States to protect Fourth Amendment rights, requires the suppression of incriminating evidence obtained in the course of a police search con-

ducted in good faith, but pursuant to a warrant which, although issued on probable cause, violated the constitutional and statutory requirement that search warrants describe the things to be seized. See Fourth Amendment to the Constitution of the United States;[1] art. 14 of the Declaration of Rights of the Constitution of the Commonwealth;[2] and G. L. c. 276, § 2.[3] We conclude that, solely on the basis of the opinions of the Supreme Court of the United States, the exclusionary rule requires the suppression of the evidence seized pursuant to this defective warrant. We reject the defendant's other, considerably less substantial challenges to his conviction.

The badly burned body of Sandra D. Boulware, a twenty-nine year old black woman, was found in a vacant lot in the Roxbury section of Boston at approximately 5 A.M. on Saturday, May 5, 1979. Pieces of wire were found on the body and in the vicinity of the body. An autopsy, conducted about 8 A.M. that day, disclosed that the victim had died of multiple compound comminuted skull fractures, caused by at least four blows inflicted within a day of the autopsy. There was medical testimony that the victim was alive, but unconscious, at the time her body was set on fire, but that she succumbed to the blows inflicted on her and not as a result of the burning of her body.

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[1] The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[2] Article 14 provides, in part, that "[e]very subject has a right to be secure from all unreasonable searches, and seizures, of . . . all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant . . . to make search in suspected places . . . or to seize . . . property, be not accompanied with a special designation of the . . . objects of search . . . or seizure."

[3] General Laws c. 276, § 2, as appearing in St. 1964, c. 557, § 2, provides in part that "[s]earch warrants . . . shall particularly describe the property or articles to be searched for." They must be substantially in the form prescribed in G. L. c. 276, § 2A.

The victim's sister had reported her missing on May 4, and said that she had last seen her on May 1. She identified the body at the morgue. The police learned that the victim had two boyfriends, "Rudy" and "Jimmy." The defendant was known as "Jimmy." The police interviewed "Rudy" on Saturday afternoon, May 5. They also undertook to locate the defendant. Two police officers who knew the defendant went looking for him. They eventually went to a house in Dorchester known as a "gaming house," because card games were regularly played there. After they rang the doorbell, the defendant answered the door. The police told him that "the Sergeant" wanted to talk to him at the police station. The defendant said, "Let me get my coat." He went upstairs, accompanied by one of the police officers, and obtained his coat. The defendant, who was not handcuffed, rode to the police station in the back seat of an unmarked police cruiser; the two policemen were in the front seat. The defendant had had experience with police investigations; he had been arrested previously; and he knew he was not in custody. One of the policemen gave the defendant Miranda warnings. In answer to questions in the cruiser, the defendant said he had last seen the victim on Tuesday (May 1). He had gone to her house, stayed there for about an hour, and left with her in a taxicab. They stopped to purchase some marihuana and a bottle of amaretto. The victim left him, he said, at 1 P.M. and he had not seen her since. One of the policemen told the defendant that Sandra Boulware was "no longer with us."

At the District 2 police station, Sergeant Bornstein interviewed the defendant in the presence of several other officers. The interview, which lasted about an hour, was recorded on tape.[4] The defendant substantially repeated what he had said in the police cruiser on the way to the police station and added that on Tuesday, after purchasing

[4]The tape was introduced as an exhibit and was heard by the judge during the hearing on the defendant's motion to suppress. At the trial, the tape was introduced as an exhibit and heard by the jury.

the marihuana and the amaretto, he and the victim had gone to the defendant's home at 42 Deckard Street in Roxbury where the victim stayed until she left at 2 P.M. to take a cab. The defendant gave an explanation of his whereabouts from Tuesday (when he claimed he last saw the victim) until Saturday (the day of the interview). He said that he had been at the "gaming house" in Dorchester, where the police found him, from 9 P.M. on Friday (May 4) until he left at 5 A.M. on Saturday (May 5) to take a bus home to Deckard Street. The defendant identified various people who were at the "gaming house" that night. At the end of the interview, Sergeant Bornstein thanked the defendant, and the defendant left the station.[5]

The police continued their investigation. They interviewed the men who the defendant had said were at the "gaming house" on Friday night. They learned that at about 3 A.M. on Saturday, the defendant had borrowed the car of one Barros to drive two men home. He dropped them off in a trip that took no more than fifteen minutes. The defendant returned the car to the "gaming house" at about 4:45 A.M. He lay down for only a few minutes, suddenly jumped up, said he had something to do, and left.

The police also learned that at approximately 6 A.M. on Saturday, an occupant of the "gaming house," one "Pee Wee," had left for work. He noticed a pair of black calfskin gloves and a gas can in a corner of the porch, and brought them into the house. The police took possession of these items on Sunday morning.[6]

In the course of their investigation on Sunday morning, the police learned from a friend of the defendant that the

[5] The defendant's motion to suppress evidence included a challenge to the admissibility of his statements to the police in the cruiser and at the District 2 police station.

[6] At the trial, "Pee Wee" testified that on Saturday (May 5) in the afternoon, when he arrived back at the "gaming house," the defendant was there and said, "[O]h Pee Wee, I see that you brought my gloves and gas can in . . . . I appreciate it very much." The police and the prosecution were not aware of this statement until the trial.

basement of the defendant's home at 42 Deckard Street had been refinished and that the defendant had said that he entertained women there. On Sunday morning they also spoke with Barros, the owner of the car the defendant was said to have borrowed early on Saturday morning. Barros corroborated the fact that the defendant had borrowed his car, a 1975 black Thunderbird. Only the defendant had used the car in the interim. The police then inspected the Thunderbird with Barros's consent. They found bloodstains and pieces of hair on its rear bumper and near the lid of the trunk. Barros told the police that there had been no blood in the trunk or along the bumper on Friday night when he had driven the car home. Various samples were taken. Inside the trunk, the police found three types of wire.

Later Sunday morning, the district attorney for the Suffolk district, Sergeant Bornstein, and Detective Peter J. O'Malley met at the District 2 police station to discuss the case. They concluded that they should seek a warrant for the arrest of the defendant and a warrant to search 42 Deckard Street, Roxbury. Detective O'Malley prepared and typed an affidavit in support of an application for a search warrant. The district attorney, his first assistant, and Sergeant Bornstein looked at it and concluded that it set forth probable cause for the arrest and for the search.[7]

[7] The circumstances set forth in the affidavit are as follows: "On Saturday 5/5/79 at 5:00 A.M. the body of Sandra D. Boulware was found beaten and burned to death opp. 28 Hazelwood St. Rox. in a vacant field. At the time she appeared to be only partially clothed. In the course of the investigation that followed, it was determined that one Osborne Sheppard of 42 Deckard St. Rox. was the last person to have been seen with Sandra. In an interview [he] gave to Sgt. Bornstein, O. Sheppard stated that he and Sandra went to 42 Deckard St. Rox. on 5/1/79, which is the last date she was seen. That prior to going there, they had stopped and bought 2 nickel bags of herb and a fifth of amaretto liquor. Officers in this investigation have established that O. Sheppard was in possession of a 1975 blk. Ford Thunderbird, Mass. Reg. VLB PNB for a period of time, ending just before the body of Sandra was found. And that this vehicle was found to have human blood on the rear bumper that wasn't there prior to his [having] taken possession. Also in the trunk of this car were

It is at this point that problems began that led to the issuance of a defective warrant. It was then Sunday afternoon. No clerk or assistant clerk of the Roxbury Division of the District Court Department could be found, nor could a suitable form of search warrant be found at the District 2 police station or at two or three other stations. Detective O'Malley found a warrant form of the Municipal Court of the Dorchester District, once used for searches for controlled substances. He attempted to adapt the printed form. He crossed out the words "controlled substance" on the cover side of the form. On the face side, he replaced the word "Dorchester" with the word "Roxbury." He inserted a reference to "2nd & Basement" of 42 Deckard Street as the place to search. However, the reference to "controlled substance" was not deleted in those portions of the form that constituted the application for a search warrant and would constitute the warrant itself.

Arrangements were made to present the affidavit and applications for a search warrant and an arrest warrant to a judge at his home. Detective O'Malley, Sergeant Bornstein, two homicide detectives, and the first assistant district attorney went to the judge's home, arriving at approximately

found various pieces of wire and rope that may have been used to bind parts of her body. Pieces of wire were found on the body. O. Sheppard has told McKinley Grimes, a friend, that in the past he has taken women friends to his cellar at 42 Deckard St. for social purposes and has worked on the cellar to make it comfortable." (Corrected for punctuation and spelling errors.)

The affidavit described the premises to be searched as the second floor at 42 Deckard Street, Roxbury, and "that part of the cellar controlled by Osborne [Jimmy] Sheppard." It described 42 Deckard Street as a "three story red brick apartment building with a basement."

The affidavit listed the property for which the search was intended as follows: "A fifth bottle of amaretto liquor, 2 nickel bags of marijuana, a woman's jacket that has been described as black-grey (charcoal), any possessions of Sandra D. Boulware, similar type wire and rope that match those on the body of Sandra D. Boulware, or in the above Thunderbird. A blunt instrument that might have been used on the victim, men's or women's clothing that may have blood, gasoline burns on them. Items that may have fingerprints of the victim." (Corrected for punctuation and spelling errors.)

2:45 P.M. The judge took Detective O'Malley's oath and signed the affidavit to that effect. The judge searched his library without success for an appropriate form of search warrant. He then took the "controlled substance" form from Detective O'Malley, made some changes on it, and dated and signed the warrant. The judge made no change in the substantive portion of the printed warrant form which, therefore, contained authority "to search for any controlled substance, article, implement or other paraphernalia used in, for, or in connection with the unlawful possession or use of any controlled substance." The warrant made no reference to the items listed in Detective O'Malley's affidavit in support of the application. It neither listed them, nor incorporated them by reference; nor was the affidavit attached to the warrant.[8] The judge gave the search warrant, the affidavit, and the arrest warrant to the police. The defendant raises no challenge to the arrest warrant. Detective O'Malley left the judge's home with the affidavit and had it with him during the search. He thought the search warrant was legal and proper when he left the judge's home. The arrest warrant was executed at the "gaming house," while Detective O'Malley and a team of police personnel went to 42 Deckard Street to search its second floor and basement.

At about 5 P.M. Detective O'Malley and others were admitted to 42 Deckard Street. Detective O'Malley spoke with the defendant's mother and sister, showed them the warrant, and said the police were going to look in the defendant's room and in the cellar for things that were implicated in a homicide. It does not appear that either of the two women read the warrant or asked to have it read.

We summarize the evidence seized at 42 Deckard Street which was introduced at the trial. From the defendant's

[8] We note in passing, although the Commonwealth makes no point of it before us, that the warrant on its face authorized a search for marihuana, that the affidavit referred to marihuana, and that a search for marihuana at 42 Deckard Street was justified by probable cause.

second floor bedroom, the police took apparently blood-stained black boots. In the cellar, part of which was furnished as a playroom, Detective O'Malley found what appeared to be blood stains on the concrete floor and chipped off and took pieces of that concrete. He found two unmatched women's earrings, one apparently with blood-stains, under a piece of plywood which in turn was under a mat in the unfinished portion of the cellar. In the unfinished portion of the cellar, he found an apparently blood-stained envelope, a pair of apparently bloody men's jockey shorts and women's leotards, later determined to be blood-stained. He also found there three types of wire and a woman's hairpiece.

We interrupt the chronology of events to describe evidence introduced at the trial bearing on the significance of these items seized at 42 Deckard Street. A police chemist testified that wire found at the murder scene was similar to wire found in the Thunderbird and in the basement of 42 Deckard Street. He also found a close resemblance between wire of a different type found in the cellar and also in the Thunderbird. A neighborhood friend of the victim identified the bloody earring recovered from the basement as looking like one the victim was wearing about one week before her disappearance. She also identified the leotards as of a type she and the victim had purchased together and the hairpiece as one the victim was wearing the last time she saw the victim alive on Monday, the day before she disappeared. Another witness identified the earring as belonging to the victim.

A special agent of the FBI, assigned to the serology unit of the FBI laboratory in Washington, D.C., testified that blood from the bumper of the Thunderbird was human blood, type O, and contained enzyme groups PGM 2-2 and EAP B-A; that the right black boot found in the defendant's bedroom had human blood on it, type O, with enzymes PGM 2-2 and EAP B-A; that blood found underneath the victim's head at the murder scene was human blood containing enzymes PGM 2-2 and EAP B-A (but he could not

determine the blood grouping); that blood taken from the victim's body by the medical examiner contained enzymes PGM 2-2 and EAP B-A. There was other evidence introduced showing that the victim had blood type O. The concrete chips and the envelope taken from the cellar were found to be stained with type O blood. The FBI expert witness testified further that about 1% of the population would have blood type O and the enzymes PGM 2-2 and EAP B-A.

It can readily be seen that evidence seized in the search of 42 Deckard Street tended to show that the defendant seriously injured the victim in his cellar, hid her earrings under a piece of plywood under a mat, and tied her up with wire available in the cellar of his home. This evidence, much of it obtained as a result of careful and commendable police investigatory techniques, was highly probative of the defendant's guilt. Although the Commonwealth could have presented a case against the defendant without this evidence, this evidence was most important in rounding out a case based only on circumstantial evidence.

An indictment was returned against the defendant on May 14, 1979, charging him with murder, including murder in the first degree, of Sandra D. Boulware. The defendant moved to suppress the statements he made to the police on May 5 and the items seized on May 6 at 42 Deckard Street. He claimed, among other things, that his interrogation on May 5 was a custodial interrogation in violation of his Fourth Amendment rights. In turn, he argued that the search warrant was based on his statements to the police and that the items seized pursuant to the search warrant had to be suppressed as the product of his unconstitutional interrogation. Further, he argued that the items seized at 42 Deckard Street should be suppressed because they were seized pursuant to a defective, unconstitutional search warrant.

A judge of the Superior Court held a three day hearing on the motion to suppress in September, 1980. He made extensive findings of fact and rulings of law. He dealt with certain issues that are not argued on appeal. He concluded

that the defendant freely and voluntarily made statements on May 5 at the District 2 police station after a knowing waiver of his Miranda rights. He concluded that the investigation had not then focused on the defendant. He did not explicitly discuss the defendant's argument that his statements should be suppressed because of his "illegal arrest" or "seizure," but it is apparent from his findings that he regarded the defendant's trip to the police station and his statements made there as voluntary. He, therefore, denied the motion to suppress as it applied to the defendant's statements to the police on May 5.

On the matter of the search warrant, he concluded that the warrant was issued on probable cause. He concluded, however, that the warrant was defective because it failed to list the items to be seized or to incorporate a list of those items by reference. He then considered whether the exclusionary rule as applied to Fourth Amendment violations required suppression of the evidence seized pursuant to the defective warrant. He had found that the police had a legitimate need to proceed with dispatch in obtaining the search warrant. The defendant was at liberty and could reasonably be expected to learn from those questioned at the "gaming house" that the police were investigating him. He found further tfat the judge told Detective O'Malley that he would make the necessary changes in the warrant form so as to provide a suitable form of search warrant and that the warrant as delivered was sufficient authority in form and content to carry out the search as requested. He found also that the search of 42 Deckard Street was carried out within the limits that Detective O'Malley understood the warrant to permit and that Detective O'Malley had the affidavit and search warrant with him at 42 Deckard Street. He concluded that "the actual search undertaken was within the limits of the authority the police thought reasonably had been granted." He denied the defendant's request to suppress the evidence seized at 42 Deckard Street.

The judge concluded that the good faith exception to the exclusionary rule advanced by certain judges in *United*

States v. *Williams*, 622 F.2d 830, 840-847 (5th Cir. 1980) (en banc) (alternative holding), cert. denied, 449 U.S. 1127 (1981), was well reasoned and persuasive. He gave greater weight to the opinion of this court in *Commonwealth* v. *Rugaber*, 369 Mass. 765, 769 (1976), in which we upheld admission of evidence seized pursuant to an assumedly defective search warrant. He regarded the *Rugaber* case as "a situation where law enforcement officials acted mistakenly but upon probable cause and in good faith and which presented a factual situation in which exclusion would have no deterrent effect."[9] He concluded that the police who executed the warrant at Sheppard's dwelling would act similarly in similar situations in the future, and that "the only consequence of applying the exclusionary rule would be to keep from the jury probative evidence and thereby impair the truth finding function." The judge did not cite any case in which the exclusionary rule had been considered in a situation in which error was committed, not by the police or law enforcement officials, but by a judge or issuing magistrate. Neither the *Williams* case nor the *Rugaber* case, relied on by the judge, were opinions of the Supreme Court, which, of course, has the final word on this question.

1. The judge properly denied that portion of the defendant's motion to suppress evidence that was directed toward his statements made to the police on Saturday, May 5. The

[9] In the *Rugaber* case, a search was conducted on probable cause pursuant to a search warrant that properly described the street address of the premises to be searched but contained a physical description of a house next door. *Commonwealth* v. *Rugaber*, 369 Mass. 765, 767 (1976). The warrant was executed at night; officers on the scene directed the executing officers to the proper house; the proper premises were in fact searched; and the officers were unaware of the misdescription when they executed the warrant. *Id.* We regarded the case as a close one. *Id.* at 768. We noted that "[i]nvocations of error and inadvertence cannot ordinarily save an invalid warrant." *Id.* at 767. The police were not reckless but at most negligent in the description. *Id.* In these circumstances, we "agree[d] with the judge, who ruled that even if the warrant was defective, the exclusionary rule should not be applied, since it could have no deterrent effect." *Id.* at 769. The case before us is not, of course, like the *Rugaber* case, one in which the search warrant was ambiguous.

judge found, on ample evidence, that the defendant voluntarily accompanied the police to the station. At the time of the interview, the police investigation had not yet focused on the defendant, and the officers only requested, but did not order, that he accompany them to the station for questioning. He was not handcuffed; he rode alone in the back of the unmarked police cruiser; he knew he was not in custody. When the interview ended, the sergeant thanked him for his cooperation, and he left.

This issue is substantially disposed of by what we said recently in *Commonwealth* v. *Bookman*, 386 Mass. 657, 659-661 (1982). This is not a case like *Dunaway* v. *New York*, 442 U.S. 200 (1979), on which the defendant relies, where there was a custodial interrogation, not supported by probable cause, of a defendant who was involuntarily detained. The circumstances here are like those in *United States* v. *Mendenhall*, 446 U.S. 544, 557-558 (1980), in which the Court held that the defendant's Fourth Amendment rights were not violated when she voluntarily accompanied law enforcement agents to their office for questioning. As in the *Mendenhall* case, the prosecution here met its burden of proving that the interview was not the product of express or implied coercion, but resulted from the defendant's voluntary consent. See, as to the absence of Fourth Amendment violations where persons consent to accompany police officers to station houses for interrogation, *United States* v. *Huberts*, 637 F.2d 630, 635-637 (9th Cir. 1980), cert. denied, 451 U.S. 975 (1981); *United States* v. *Williams*, 604 F.2d 1102, 1125-1126 (8th Cir. 1979). See also *Commonwealth* v. *Walden*, Mass. Adv. Sh. (1980) 1309, 1315 (interrogation of a defendant who went voluntarily to the police station).

2. We come then to the question of the admissibility of the evidence seized at 42 Deckard Street purportedly pursuant to the search warrant. We start with our expression of agreement with the judge's conclusion that the warrant was defective. It failed to describe the items sought to be

seized.[10] There is authority upholding a warrant, which does not on its face list any items to be seized, but which incorporates by reference an accompanying or attached description of the items to be seized.[11] The warrant in this case, however, described items (drugs and drug paraphernalia) different from those listed in the affidavit (which related to the murder of Sandra Boulware, but did include marihuana). Moreover, the warrant was not attached to Detective O'Malley's affidavit which listed the items which the judge had found there was probable cause to seize. Most importantly, the warrant did not contain any words which referred to the affidavit. It is true that Detective O'Malley had with him, when he conducted the search, the application for a warrant which listed the items to be seized. We noted in *Commonwealth* v. *Taylor*, Mass. Adv. Sh. (1981) 821, 826-827 n.5, that we were not called on there to decide "whether we would allow a separate document to supply the specificity if, though physically attached to the warrant, it was not referred to therein."[12] Here, however, not only is there a lack of reference, but also the warrant listed a differ-

[10] The Fourth Amendment requires that a search warrant describe the "things to be seized." See *Marron* v. *United States*, 275 U.S. 192, 196 (1927). Article 14 of the Massachusetts Declaration of Rights requires that the warrant be "accompanied with a special designation of the . . . objects" of seizure. The purpose of these limitations is to forbid general warrants (see *Boyd* v. *United States*, 116 U.S. 616, 624-626 [1886]), and in doing so to circumscribe the discretion of the executing officer and to inform the person or persons subject to the seizure what the officer is entitled to take. See *Commonwealth* v. *Accaputo*, Mass. Adv. Sh. (1980) 1009, 1019; *In the Matter of the Application of Lafayette Academy, Inc.*, 610 F.2d 1, 4 (1st Cir. 1979). See also G. L. c. 276, § 2, which requires that the warrant "particularly describe the property or articles to be searched for."

[11] *Commonwealth* v. *Taylor*, Mass. Adv. Sh. (1981) 821, 825-826, and cases cited.

[12] In the *Taylor* case, *supra* at 826-827 n.5, we noted *Castle News Co.* v. *Cahill*, 461 F. Supp. 174, 181 (E.D. Wis. 1978), which sustained a warrant that did not refer to an attached document which provided the requisite specificity. To the same general effect, see *Moore* v. *United States*, 461 F.2d 1236, 1238-1240 (D.C. Cir. 1972). Contra *Brooks* v. *Taylor Tobacco Enters. Inc.*, 260 S.E.2d 419, 422-423 (N.C. 1979).

ent set of items to be seized, and no further description was attached to the warrant. We are not aware of any court that has gone so far as to uphold a general warrant to search particular premises where the searching officer had with him a description of the items to be seized but the warrant made no reference to that description and that description was not attached to the warrant. We thus proceed on the premise that the search warrant in this case violated the requirements of the Fourth Amendment to the United States Constitution, art. 14 of the Declaration of Rights, and G. L. c. 276, § 2. The question remains whether the defect in the warrant requires the suppression of evidence obtained in the search.

The exclusionary rule is "a judicially created means of effectuating the rights secured by the Fourth Amendment." *Stone* v. *Powell*, 428 U.S. 465, 482 (1976). It is "designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than [as] a personal constitutional right of the party aggrieved." *United States* v. *Calandra*, 414 U.S. 338, 348 (1974). See *United States* v. *Peltier*, 422 U.S. 531, 538-539 (1975). Moreover, because, under some circumstances, evidence obtained as the result of an unreasonable search or seizure in violation of Fourth Amendment rights is admissible, the exclusionary rule is not coextensive with the prohibitions of the Fourth Amendment.[13]

Furthermore, because evidence obtained in violation of the Fourth Amendment is admissible in particular circumstances, the notion that such evidence must in all instances

[13] Instances in which evidence obtained in violation of the Fourth Amendment is admissible in judicial proceedings include: (a) a case in which no objection is raised to the introduction of such evidence, (b) the use of such evidence in grand jury proceedings (*United States* v. *Calandra*, 414 U.S. 338, 350-352 [1974]), (c) introduction of such evidence for the impeachment of a defendant (*Walder* v. *United States*, 347 U.S. 62 [1954]), (d) circumstances in which the defendant has no standing to challenge the constitutional violation (*Rakas* v. *Illinois*, 439 U.S. 128 [1978]), and (e) the use of evidence seized by one sovereign in civil proceedings brought by another sovereign (*United States* v. *Janis*, 428 U.S. 433, 453-454 [1976]).

be excluded in order to preserve judicial integrity fails as a substantial, independent support for the rule. *Stone* v. *Powell*, *supra* at 485. *Id.* at 499 (Burger, C.J., concurring). See *United States* v. *Janis*, 428 U.S. 433, 458-459 n.35 (1976).[14]

The substantial, and perhaps only, justification for the exclusionary rule relied on by a majority of the Justices of the Supreme Court is the goal of deterring unconstitutional conduct by the police and other law enforcement personnel. See *Stone* v. *Powell*, 428 U.S. 465, 486 (1976); *United States* v. *Peltier*, 422 U.S. 531, 542 (1975); *United States* v. *Calandra*, 414 U.S. 338, 347 (1974). As we have demonstrated in this opinion, the police conduct in this case was proper. They had probable cause to search the premises, and they prepared an adequate affidavit setting forth that probable cause and submitted it to a judge.[15] The police then received a search warrant that they reasonably believed, on advice from the judge, was adequate to justify a search of the designated premises for the items listed in the application for the warrant.

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[14] We acknowledge the views of Mr. Justice Brennan that the exclusionary rule enables "the judiciary to avoid the taint of partnership in official lawlessness" and assures the people "that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government." *United States* v. *Calandra*, *supra* at 357 (Brennan, J., dissenting). See also *United States* v. *Peltier*, 422 U.S. 531, 551-562 (1975) (Brennan, J., dissenting). There are those critics of the rule who would suggest, however, that exclusion of probative and reliable evidence itself seriously undermines popular trust in government. See references in Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665, 737-738 (1970), and in Sunderland, Liberals, Conservatives, and the Exclusionary Rule, 71 J. Crim. L. & Criminology 343, 359-360 (1980). See also *Stone* v. *Powell*, 428 U.S. 465, 491 (1976).

[15] This is not, therefore, a case in which the police failed to demonstrate probable cause in the application for the warrant. In such a situation, a magistrate's erroneous conclusion that probable cause was shown could not breathe validity into a warrant. Application of the exclusionary rule would be justified to deter future, inadequate presentations by officer-affiants. See *Franks* v. *Delaware*, 438 U.S. 154, 164-165 (1978); *Aguilar* v. *Texas*, 378 U.S. 108, 114-116 (1964).

The police next conducted a search of Sheppard's dwelling in a manner consistent with their good faith belief that a proper warrant had been issued. They did not exceed the scope of the search that would have been authorized by a warrant in the form that they sought and believed they had. The items that were the subject of the intended search were disclosed on the application for the warrant, which was present at the scene of the search. In short, the police conducted the search in a good faith belief, reasonably held, that the search was lawful and authorized by the warrant issued by the judge. The defect in the warrant was not harmful to the defendant in the circumstances of the actual search. The search was conducted in the same way and with the same results as it would have been conducted if the warrant had not been defective.[18]

The question is whether an error of a magistrate, unrelated to police error, calls for the application of the exclusionary rule. It could be argued that the exclusionary rule should apply with particular force to evidence seized pursuant to a search warrant failing to meet Fourth Amendment standards, issued by a judge who should have known, and should have been most sensitive to, the defendant's constitutional rights. If a "criminal is to go free because the constable has blundered" (*People* v. *Defore*, 242 N.Y. 13, 21 [1926] [Cardozo, J.]), perhaps the criminal should go free as well because the magistrate blundered, even though "the suppression of probative but tainted evidence exacts a costly toll upon the ability of courts to ascertain the truth in a criminal case." *United States* v. *Payner*, 447 U.S. 727, 734 (1980). The issue is whether the exclusionary rule should be applied to deny to a jury evidence highly probative of the defendant's guilt of murder because a judge, negligently but

[18] We note that there is no issue in this case as to the reliability of the evidence sought to be excluded. Unlike evidence, such as a confession, obtained in violation of constitutional rights, the physical evidence seized from 42 Deckard Street has not been rendered untrustworthy by the fact that it was seized pursuant to a constitutionally defective warrant. See *Stone* v. *Powell*, 428 U.S. 465, 490 (1976).

in good faith, failed to strike out certain words in the warrant and failed to refer to, or to attach to it, a list of the items to be seized. We are not dealing here with judicial error rising above the level of negligence.[17]

We have found little discussion of the goal of deterrence underlying the exclusionary rule as applied to an error of a judge, except as related to his misconception of the propriety of police conduct.[18] On occasion, the exclusionary rule has been characterized as directed not only toward deterring police misconduct but also "official misconduct" or

[17] We acknowledge that in this case the problem arose on a Sunday in circumstances in which no proper form of warrant was readily available to the judge and there was a need for prompt action. We do not, however, intend to minimize the judge's error. The failure properly to describe in the warrant the items to be seized was a serious omission of constitutional significance.

[18] In *Richmond* v. *Kentucky*, 29 Crim. L. Rep. (BNA) 2529 (Ky. Ct. App. July 31, 1981), the court did not suppress evidence seized in good faith pursuant to a warrant issued on probable cause by a judge who, it was assumed, lacked authority to issue the warrant in the district in which it was issued. There was no showing that the judge acted in bad faith. See *United States* v. *Acosta*, 501 F.2d 1330, 1337 (1974) (Gee, J., dissenting) ("Nor would I expand the [exclusionary] rule to 'deter' magistrates from failing to record matter upon which they rely, conceiving that they will obey the mandates of reviewing magistrates, such as we, when these are understood"), modified, 509 F.2d 539 (5th Cir.), cert. denied, 423 U.S. 891 (1975); *State* v. *Lien*, 265 N.W.2d 833, 840-841 n.1 (Minn. 1978), quoting *State* v. *Nolting*, 312 Minn. 449, 456-457 n.7 (1977) (exclusionary rule is directed at police, not magistrate, misconduct).

For a contrasting view, see *United States* v. *Karathanos*, 531 F.2d 26, 33-34 (2d Cir.) ("[T]he exclusionary rule [ ] [has the] effect of making . . . [magistrates] aware that their decision to issue a search warrant is a matter of importance . . . in regard to the success of any subsequent criminal prosecution. [It] may well induce them to give search warrant applications the scrutiny which a proper regard for the Fourth Amendment requires . . . . [Also,] the present universal application of the exclusionary rule . . . gives law enforcement officers no . . . incentive to seek out the most lenient magistrates"), cert. denied, 428 U.S. 910 (1976). See also *Powell* v. *Stone*, 507 F.2d 93, 98 (9th Cir. 1974), rev'd on other grounds, 428 U.S. 465 (1976), in which the Ninth Circuit Court of Appeals applied the exclusionary rule to evidence seized in good faith pursuant to an unconstitutional substantive statute in order to "deter[ ] legislators from enacting such statutes."

"the Government's unlawful conduct." See *United States* v. *Calandra*, 414 U.S. 338, 348 (1974).[19]

There may be reasonable distinctions between police misconduct and an error of a magistrate such as is involved in this case. Police officers have the objectives of apprehending criminal wrongdoers and of obtaining evidence to convict them. As the Supreme Court has said, they are engaged in the "often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, 333 U.S. 10, 14 (1948). The exclusionary rule is applied to evidence seized in an unlawful manner by law enforcement officials because it is assumed that such exclusion will "deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures . . . '[by] compel[ling] respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it.'" *United States* v. *Calandra*, *supra* at 347, quoting from *Elkins* v. *United States*, 364 U.S. 206, 217 (1960). See *Stone* v. *Powell*, 428 U.S. 465, 492 (1976); *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974).

Unlike police officers, magistrates who issue search warrants are required by law to be neutral and detached. According to the Supreme Court, only if the issuing magistrate is detached from the often competitive business of ferreting out crime can a search warrant satisfy the Fourth Amend-

[19]This court has not dealt with the application of the exclusionary rule to deter conduct of judges or magistrates. We have said that "[o]ne branch of the government should not be permitted to use the flagrant wrongdoing of another branch of government to punish a citizen." *Commonwealth* v. *Nine Hundred & Ninety-Two Dollars*, Mass. Adv. Sh. (1981) 1420, 1427. In that case, however, we were dealing with alleged police misconduct. We concluded there that, under art. 14 of the Declaration of Rights, a negligent misrepresentation in an affidavit in support of a search warrant of a fact material or necessary to a finding of probable cause would not alone require the suppression of evidence seized pursuant to such a warrant. *Id.* We noted that where "a police affiant's misstatement is the product of good faith but negligent conduct, the motivation to temper and regulate police behavior is less and the arguments against the government's using the product of that good faith but negligent conduct against a defendant are weakened." *Id.* at 1427-1428.

ment. *Johnson* v. *United States*, *supra*. Here, Sheppard does not claim that the issuing judge joined the police officers in an attempt to investigate Sandra Boulware's homicide, or that the judge was anything but impartial to, and disentangled from, the investigation. Contrast *Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319, 326-328 (1979) (town justice acting as a member of a search party under a general warrant).

An issuing magistrate, in contrast to a law enforcement official, should not be involved in searching for evidence, apprehending suspects, and convicting criminals. His job is not a partisan one of ferreting out evidence and seeing it used to prosecute criminals. Instead, he should care foremost about whether he correctly applies the laws of the State and nation, including the Fourth Amendment and art. 14 of the Declaration of Rights. Ideally, he should be indifferent as to whether a particular piece of evidence is admitted at trial or a particular defendant is convicted. The police, in contrast, properly should be partisan, investigatory, and oriented toward discovering and convicting perpetrators of crime.

The exclusionary rule may not be well tailored to deterring judicial misconduct. If applied to judicial misconduct, the rule would be just as costly as it is when it is applied to police misconduct, but it may be ill-fitted to the job-created motivations of judges. As we have said, ideally a judge is impartial as to whether a particular piece of evidence is admitted or a particular defendant convicted. Hence, in the abstract, suppression of a particular piece of evidence may not be as effective a disincentive to a neutral judge as it would be to the police. It may be that a ruling by an appellate court that a search warrant was unconstitutional would be sufficient to deter similar conduct in the future by magistrates. We question, therefore, whether suppression of evidence is necessary as a deterrent in cases where the police conduct was entirely proper, the defendant was not prejudiced by the magistrate's error, and an appellate court clearly identifies the magistrate's error of law as a guide to future conduct.

We recognize that our task is to seek to apply the interpretations of the Constitution of the United States expressed by the Supreme Court of the United States. The usual result in a case where a warrant fails to describe the items to be seized is the suppression of the evidence seized pursuant to that warrant. See *Coolidge* v. *New Hampshire*, 403 U.S. 443, 471 (1971). Although there are statements of individual Justices of the Supreme Court critical of the application of the exclusionary rule in particular circumstances,[20] we conclude, on the basis of opinions of the Supreme Court to

[20] See *Stone* v. *Powell*, 428 U.S. 465, 501 (1976) (Burger, C.J., concurring); *id.* at 538-540 (White, J., dissenting); *Bivins* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 411-427 (1971) (Burger, C.J., dissenting); *Rakas* v. *Illinois*, 439 U.S. 128, 156 n.5 (1978) (Powell, J., concurring); *Brown* v. *Illinois*, 422 U.S. 590, 611-612 (1975) (Powell, J., concurring); *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974).

These expressions of opinion suggest that, in certain instances at least, a good faith exception to the exclusionary rule might be adopted. Such an exception was recognized as appropriate by a majority of the judges of the Fifth Circuit Court of Appeals in *United States* v. *Williams*, 622 F.2d 830, 840-847 (5th Cir. 1980) (en banc) (alternative holding), cert. denied, 449 U.S. 1127 (1981). In a recent opinion, the Court noted, however, that "the State contends that the police conduct here argues for adopting a 'good faith' exception to the exclusionary rule. To date, we have not recognized such an exception, and we decline to do so here." *Taylor* v. *Alabama*, 102 S. Ct. 2664, 2669 (1982). That case involved the suppression of a confession made shortly after an illegal arrest unsupported by probable cause.

For a detailed discussion of the appropriateness of a good faith exception, see Ball, Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule, 69 J. Crim. L. & Criminology 635 (1978).

It has also been suggested that the exclusionary rule not apply to serious crimes. See Kaplan, The Limits of the Exclusionary Rule, 26 Stan. L. Rev. 1027, 1046-1049 (1974). Professor Kaplan notes certain problems, however, with the adoption of an exception to the exclusionary rule even where the police error is inadvertent and reasonable. *Id.* at 1044-1045. See 1 W. LaFave, Search and Seizure § 1.2 (d), (e), and (f), at 34-39 (1978).

The Model Code of Pre-Arraignment Procedure § SS 290.2 (2) (Proposed Official Draft 1975), suggests that, apart from constitutional mandates, a motion to suppress evidence should be granted only where the asserted violation is substantial. In determining the substantiality of the violation, the Model Code directs courts to consider all the circumstances, including the extent of the deviation from lawful conduct, the extent to

date, that the exclusionary rule requires the suppression of the evidence seized at 42 Deckard Street.[21] Because the exclusionary rule as applied by the Supreme Court in implementing the purposes of the Fourth Amendment requires the suppression of this evidence, we need not consider whether the evidence should be suppressed pursuant to the laws of this Commonwealth. To this date this court has not adopted an exclusionary rule under the law of the Commonwealth to remedy a violation of a criminal defendant's art. 14 rights.[22]

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which the violation was wilful, the extent to which privacy was invaded, the extent to which exclusion will tend to prevent violations of the law, and the extent to which the violation prejudiced the defendant's ability to defend himself. *Id.* at § SS 290.2 (4).

[21] There is no basis for concluding that this evidence was only cumulative. It was of probative force tending, independently of other evidence, to prove the defendant's guilt. Therefore, its admission cannot be upheld on the ground that such admission was harmless beyond a reasonable doubt.

[22] Before *Mapp* v. *Ohio*, 367 U.S. 643 (1961), applied the exclusionary rule to the States through the Fourteenth Amendment, illegally seized material could be admitted in evidence in the courts of this Commonwealth. See *Commonwealth* v. *Spofford*, 343 Mass. 703, 706 (1962); *Commonwealth* v. *Wilkins*, 243 Mass. 356, 359 (1923) (art. 14 of the Declaration of Rights does not bar admission of unlawfully seized evidence).

We have noted the possibility of affording more substantive protection to criminal defendants under art. 14 of the Declaration of Rights than under the Fourth Amendment as applied through the Fourteenth Amendment. See *Commonwealth* v. *Podgurski*, 386 Mass. 385, 391 n.11 (1982); *District Attorney for the Plymouth Dist.* v. *New England Tel. & Tel. Co.*, 379 Mass. 586, 589 (1980); *id.* at 597 n.1 (Liacos, J., dissenting); *Commonwealth* v. *Ortiz*, 376 Mass. 349, 358 (1978). We have concluded that, where the police intentionally deprived a defendant of his statutory right to use a telephone (G. L. c. 276, § 33A), "evidence of an in-custody inculpatory statement or corporeal identification, even if accidental, should not be admitted unless the Commonwealth can show beyond a reasonable doubt that the evidence is untainted by the deprivation of the defendant's right." *Commonwealth* v. *Jones*, 362 Mass. 497, 503 (1972). See *Commonwealth* v. *Monosson*, 351 Mass. 327, 329-330 (1966). In *Selectmen of Framingham* v. *Municipal Court of the City of Boston*, 373 Mass. 783, 786-788 (1977), we ruled that, "as matter of Massachusetts law, even though it may not be required by the Federal Constitution," evidence seized from a police officer's home in violation of the Fourth Amendment and art. 14 was not admissible in an administrative hearing to remove the officer.

3. Because they may arise at a retrial of the defendant, we comment on two other issues raised by the defendant. There is no basis for reversal of the conviction on the ground that the judge abused his discretion in denying the defendant's motion that, if he were to testify, the Commonwealth should be barred from using certain prior convictions, pursuant to G. L. c. 233, § 21, for the purpose of impeachment. See *Commonwealth* v. *Diaz*, Mass. Adv. Sh. (1981) 605, 610-612. Nor was there error in denying the defendant's request that he be allowed to make a sworn or an unsworn statement to the jury at the close of the evidence. The matter was within the judge's discretion. *Commonwealth* v. *Rodriquez*, 364 Mass. 87, 95-96 (1973). The defendant has made no showing of an abuse of discretion.

Judgment reversed.
Verdict set aside.

Liacos, J. (concurring, with whom Abrams, J., joins). While I agree with the result reached by the court, I cannot join in that portion of the opinion of the plurality of the court (Part 2) which treats the issue of the admissibility of evidence seized under a warrant admittedly defective.

My disagreement is specifically directed to the grudging acceptance of the exclusionary rule displayed by Justice Wilkins in his discussion of the law and the facts. Cf. *Commonwealth* v. *Loughlin*, 385 Mass. 60, 63 n.3 (1982) ("Doubt about the wisdom of the views of the Supreme Court . . . on the subject of illegal searches and seizures . . . hardly justifies ignoring those views when Fourth Amendment issues are raised in this court"). Moreover, the discussion by the plurality opinion does not accurately reflect either the facts of this case or the relevant legal principles. The plurality initially describes the question involved as one that is both "serious and challenging," because it deals with a "police search conducted in good faith." *Supra* at 488. Further, the plurality describes the issue as "whether an er-

error of a magistrate, unrelated to police error, calls for the application of the exclusionary rule." *Supra* at 503. The plurality then characterizes the error of the magistrate as one that occurred "negligently but in good faith" and as one not "rising above the level of negligence." *Supra* at 503, 504.

It is clear and established law that a warrant, albeit based on probable cause, must specifically describe the premises to be searched and the objects to be seized in order to be a valid basis of a search. *Ybarra* v. *Illinois*, 444 U.S. 85, 92 n.4 (1979). *Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319 (1979). *Stanford* v. *Texas*, 379 U.S. 476 (1965). *Marcus* v. *Search Warrant of Property at 104 E. Tenth St., Kansas City, Mo.*, 367 U.S. 717 (1961). *Marron* v. *United States*, 275 U.S. 192, 196 (1927). *Commonwealth* v. *Smith*, 370 Mass. 335, cert. denied, 429 U.S. 944 (1976). *Commonwealth* v. *Hall*, 366 Mass. 790 (1975). The warrant herein had no reference whatsoever to the items sought to be seized, contrary to the requirements of the Fourth Amendment to the United States Constitution, art. 14 of the Declaration of Rights, and G. L. c. 276, § 2. Yet the plurality seeks to minimize this violation because of the alleged "good faith" of a magistrate in issuing this grossly defective warrant.

The motion judge ruled, and a majority of the court agrees, the search warrant was constitutionally defective and in violation of Federal and State law because it did not describe with particularity the items sought in the search.[1] *Supra* at 489. See generally *supra* at 500 n.10. The court then concludes that the exclusionary rule requires the suppression of the evidence seized pursuant to the search warrant. Because, however, the plurality finds it necessary to engage in a gratuitous discussion of the wisdom of the rule in this instance, I am compelled to state my views on this issue.

[1] "Such particularity is necessary in order to identify . . . the things to be seized; it both defines and limits the scope of the search and seizure, thereby protecting individuals from general searches, which was the vice of the pre-Revolution writs of assistance." *Commonwealth* v. *Pope*, 354 Mass. 625, 629 (1968).

I point out first that nowhere in the judge's written findings is there a finding that the actions of the magistrate were merely negligent. Indeed, while the judge viewed the police as having acted in good faith,[2] at the hearing on the motion he characterized the actions of the magistrate in these terms: "I saw this search warrant, and when I saw it I had to put my glasses on because I had not seen anything like that before. . . . [T]his warrant is so inappropriate [as] to be plainly unconstitutional," under the State and Federal Constitutions.[3] The judge viewed the warrant as a "general warrant" akin to the colonial "writs of assistance" which led to the enactment of art. 14 of the Massachusetts Constitution and the Fourth Amendment. He regarded the warrant as one that "flies right in the face of the Constitution." He characterized the magistrate's issuance of this warrant as a "judicial blunder." In describing the warrant, he stated he had "never seen anything so plainly on its face a nullity."

A reading of the search warrant in this case reveals that the judge's views were not unduly harsh.[4] Although the plurality agrees that the warrant nowhere described the things the police sought to seize and was thus unconstitutional, the plurality's view of the magistrate's error as being merely one of negligent good faith is supported neither by the record nor the findings of the motion judge. A proper legal definition of "good faith" involves not only a lack of malevolence,[5] but also a reasonable effort to comply with the law. One commentator has defined the good faith "exception" as follows: "[W]hen an officer acts in the good faith belief that his conduct is constitutional *and where he has a reasonable basis for that belief*, the exclusionary rule will not operate" (emphasis added). Ball, Good Faith and

[2] I shall comment further on this point.

[3] The judge also viewed the warrant as defective under G. L. c. 276, §§ 2, 2A.

[4] The warrant used in this murder investigation is reproduced as an appendix to this opinion.

[5] I do not view the conduct of the magistrate, the police, or the office of the district attorney as malevolent.

the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule, 69 J. Crim. L. & Criminology 635, 635 (1978). See *United States* v. *Williams*, 622 F.2d 830, 841 & n.4a (5th Cir. 1980) (en banc) (alternative holding), cert. denied, 449 U.S. 1127 (1981) (recognizing that reasonable good faith exception must be grounded on an objective reasonableness) Cf. *Commonwealth* v. *Sherry*, 386 Mass. 682, 697 (1982) (mistake of fact defense requires an objective standard of reasonableness); *Commonwealth* v. *Huffman*, 385 Mass. 122, 126 (1982) (whether "exigent circumstances" present based on objective view of totality of circumstances). The magistrate who utterly fails to describe or even attempt to describe the things to be seized under the search warrant has not made a reasonable effort to comply with the law. Compare *Commonwealth* v. *Rugaber*, 369 Mass. 765 (1976).[6] This is not a case of mere accidental violation of constitutional commands.

I turn now to the conduct of the police, which both the motion judge and the plurality find to have been in "good faith." At the outset, it should be emphasized that an effort to characterize police conduct here as in "good faith" is again neither factually nor legally accurate. The evidence is undisputed that the officer seeking the warrant was an experienced officer who had been on the force for nineteen years, ten of which were as a detective. Other experienced officers were also present. Additionally, the district attorney reviewed the application typed by this officer, and the first assistant district attorney was present at the home of the magistrate when the warrant was issued. It is also undisputed that the form of the warrant used was that used

[6]The plurality points out what, assumably, it believes to be the extenuating circumstances surrounding the issuance of this warrant. In my estimation, however, because everyone involved knew that they were dealing with an improper "form" warrant that had to be adapted to fit their purposes, extra care should have been taken to ensure that the warrant read properly. Thus, I would hold the officers and the magistrate to a higher standard of good faith based on the circumstances in this case which put them on notice that a defective warrant could easily be issued if proper care were not taken.

under a narcotics statute repealed about eight years earlier. See G. L. c. 94, § 213, repealed by St. 1971, c. 1071, § 2 (now G. L. c. 94C, the Controlled Substances Act). All present at the magistrate's home knew that the form warrant given to the judge was defective in form and substance. According to those present, the judge made only two alterations in this warrant,[7] by changing the caption as to the issuing court and the name of the issuing magistrate.

Even if one puts aside the police officer's experience, there is no justification in treating the "police" separately from the first assistant district attorney, a trained and experienced prosecutor. See *Commonwealth* v. *St. Germain*, Mass. Adv. Sh. (1980) 1807, 1812 n.8 (police are also part of prosecution). To take the position that these law enforcement personnel acted in "good faith" is simply to say that no showing of evil intent has been proved. It cannot be said, however, that they acted reasonably when the officers, knowing from the start that the form warrant was improper, apparently never even read the warrant. Their acquiescence in the acts of the magistrate cannot be viewed as "good faith." The plurality's condonation of this default of responsibility by law enforcement personnel is particularly troubling.[8] In using the approach it has taken, the plurality turns its back on the teaching of history and opens the door to the return of general warrants and writs of assistance.

1. *Judicial error.* Assuming, as does the plurality opinion, that what is involved in this case is not police error but rather judicial error, the plurality points to no cases wherein the supposed good faith but negligent act of a judge who

[7] The testimony of the officer who sought the warrant was that the visit with the judge took approximately twenty-five minutes with only three or four minutes to change the form.

[8] The plurality also stresses that the search, as actually carried out, was within the limits that the police understood the warrant to permit, *supra* at 503, and, in any event, the occupants of the defendant's household did not actually read the warrant, *supra* at 494. Both of these factors appear to be irrelevant in light of our recent decision in *Commonwealth* v. *Taylor*, Mass. Adv. Sh. (1981) 821, 827.

issues a defective warrant is relevant in determining whether the evidence should be suppressed. At the appellate court of last resort in this State, our primary concern is to correct judicial error in all stages of a proceeding. I fail to understand why the "good faith" of a judge should make any difference in this case. Do we not always assume that the judges of all the various courts throughout the Commonwealth carry out their duties in good faith? If our standard of review is to be limited to examining the good faith of the judge, few cases would require reversal, and errors of law would stand uncorrected.

The plurality opinion appears to recognize that suppression of illegally seized evidence may encourage greater care by magistrates in the future, but expresses doubt as to the efficacy of such a rule in deterring judicial error. I strongly disagree with the plurality's reasoning on this point. Our responsibility as the court of last resort in this Commonwealth requires that judicial violations of the Fourth Amendment find no sanction, express or implied, in our opinions. Unless this court "safeguards its own capacity to function and to preserve the security of its people, society itself could become so disordered that all rights and liberties would be endangered." *United States* v. *United States Dist. Court*, 407 U.S. 297, 312 (1972). The language in today's opinion will hardly encourage greater care by judges who issue search warrants. Indeed, the language of the plurality cannot but encourage negligent behavior, a hardly laudable characteristic of judicial conduct. Common sense tells me that greater care will be encouraged if the rule remains as it is, viz., evidence seized under an invalid warrant will be suppressed.

2. *Prior Federal precedent.* Acknowledging, as the plurality does, that the exclusionary rule has not been applied in all circumstances by the Supreme Court of the United States, does not answer the question whether it should be applied in this instance. Admittedly, the Supreme Court has refused to extend the exclusionary rule beyond that established in *Mapp* v. *Ohio*, 367 U.S. 643

(1961). See *Alderman* v. *United States*, 394 U.S. 165, 175 (1969). See also, cases cited by the plurality, *supra* at 501 n.13. The Supreme Court, however, has continued to apply "judicially created means of effectuating the rights secured by the Fourth Amendment." *Stone* v. *Powell*, 428 U.S. 465, 482 (1976). Even those on the Supreme Court who have criticized the exclusionary rule have recognized that the rule should not be eliminated, absent a satisfactory alternative means of protecting Fourth Amendment values. Thus, despite the minority views cited by the plurality opinion, the Supreme Court has not taken the step the plurality appears to favor. Indeed, there is some recent indication that the Court would not accept a good faith exception to the exclusionary rule. See *Taylor* v. *Alabama*, 102 S. Ct. 2664, 2669 (1982) (expressly rejecting any good faith exception to exclusion of confession that was fruit of an illegal arrest).

The cases that have discussed a good faith exception to the exclusionary rule are significant to the points I have made. See *Michigan* v. *DeFillippo*, 443 U.S. 31 (1979); *United States* v. *Peltier*, 422 U.S. 531 (1975). In the *Peltier* case, the Court allowed admission of evidence obtained from a search and seizure where the officers had conducted the search in good faith reliance "upon a validly enacted statute, supported by longstanding administrative regulations and continuous judicial approval." *Id.* at 541. Similarly, in *DeFillippo*, *supra*, the Court allowed admission of evidence seized pursuant to an arrest under an ordinance which was subsequently found invalid. So long as "the arrest was valid when made, the search was valid and the [contraband was] admissible in evidence." 443 U.S. at 37. In both *Peltier* and *DeFillippo*, the *searches were valid* under the then existing law, and, more importantly, there were no search warrants involved. In the instant case, the search was invalid from the beginning.[9] It is one thing to consider

[9]The plurality's reference to the "good faith" exception relied on in *United States* v. *Williams*, 622 F.2d 830 (5th Cir. 1980) (en banc), cert.

the reasonable good faith of law enforcement officials who proceed according to then existing legal standards that are later changed, and another to consider, in hindsight, the good intentions of a judge who issued a clearly defective warrant that was invalid at the time issued and is still invalid today. "[C]learly there is a crucial distinction between withholding [the exclusionary rule's] cover from individuals whose Fourth Amendment rights have not been violated — as has been done in the 'standing' cases, . . . *Jones* v. *United States*, 362 U.S. 257 (1960) — and withdrawing its cover from persons whose Fourth Amendment rights have in fact been abridged." *United States* v. *Calandra*, 414 U.S. 338, 364-365 (1974) (Brennan, J., dissenting).

Even assuming that there was a good faith exception for judicial error, it would not apply in this case. Permeating the plurality opinion is the assumption, which is plainly stated at one point in the text, *supra* at 503, 504 that the

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denied, 449 U.S. 1127 (1981), is less than illuminating. The court in *Williams* stated: "No warrant is involved here, hence nothing that we say applies to factual situations where one has been obtained." *Id.* at 840 n.1. Additionally, the *Williams* majority made it clear that good faith alone was not sufficient; the officer's acts had to be "reasonable" as well. *Id.* at 841 n.4a. No justification can be found in *Williams* for applying its principle to negligent acts, such as are here involved.

The decision in *Williams* was "unusual." *Abell* v. *Commonwealth*, 272 S.E.2d 204, 210 (Va. 1980). Sixteen members of the twenty-four judge court held that evidence seized incident to an arrest should not be suppressed because the arrest was valid. 622 F.2d at 839. Thirteen members of the court, including some of those who joined in the first holding, united in an alternative holding that, even if the arrest were invalid, the exclusionary rule would not be applied because the officer acted under a *reasonable* good faith belief that the arrest was lawful. *Id.* at 846-847. Ten judges, in a concurring opinion, including some of those who joined in the first holding, objected to the majority's alternative holding. The concurrers chastised the court for lack of judicial restraint in writing an alternative holding not necessary to resolve the case, as the entire court agreed that the arrest was valid. The concurrers also asserted that the conclusions reached by the court in the second holding were supported only by dissenting opinions and law review articles. The *Williams* case has had, at best, a sparse following. Most importantly, the *Williams* court was dealing with reasonable conduct, not the kind of conduct here involved.

judge acted "negligently but in good faith." This is a contradiction in terms. The plurality acknowledges that the judge's error "was a serious omission of constitutional significance." *Supra* at 504 n.17. In the circumstances of this case, such error stemmed from a failure on the part of the judge to exercise reasonable care in issuing the warrant. Obviously, the judge did not read the warrant before handing it over to the police. Such behavior cannot be characterized as "good faith." Indeed, Justice Rehnquist, the most vehement critic of the exclusionary rule on the Supreme Court of the United States, has recognized that the deterrent function of the exclusionary rule is served by proscribing negligent as well as wilful behavior: "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974). In order to be viewed as being in good faith, official action, though later proved to be erroneous, must have been undertaken with a greater degree of care than was exhibited in this case. See note 6 *supra*.

The recent opinions questioning the purposes and functions of the exclusionary rule, as it applies to good faith errors by arresting or searching officers, stress the problems that the exclusionary rule "poses to the policemen who must act on the firing line (unfortunately too often literally so) and under the need to make immediate law enforcement decisions without the luxury of deliberation." *United States* v. *Santucci*, 509 F. Supp. 177, 182 (N.D. Ill. 1981), rev'd on other grounds, 674 F.2d 624 (7th Cir. 1982). The pressures of law enforcement cannot serve as an adequate basis for excusing judicial error. Cf. *Santucci*, *supra* at 182-183

(United States Attorney cannot invoke "policemen in the field" good faith exception to the exclusionary rule).

3. *Judicial integrity.* Although the plurality opinion asserts that the notion of preservation of "judicial integrity fails as a substantial, independent support for the [exclusionary] rule," *supra* at 502, it fails to address adequately whether the imperative of judicial integrity, in this particular instance, would support invocation of the exclusionary rule. See *Stone* v. *Powell*, *supra* at 485 (judicial integrity has limited role in determining whether to apply exclusionary rule *in a particular context*). "The primary meaning of 'judicial integrity' in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution." *United States* v. *Janis*, 428 U.S. 433, 458-459 n.35 (1976).

One need only turn to history to recognize the dangers to society if the judiciary cannot, or will not, diligently and carefully protect the rights of individuals. See Marsh, Some Aspects of the German Legal System Under National Socialism, 62 L.Q. Rev. 366 (1946); Roetter, The Impact of Nazi Law, 1945 Wis. L. Rev. 516. See also *Korematsu* v. *United States*, 323 U.S. 214 (1944); L. Tribe, American Constitutional Law 1000 (1978).

The imperative of judicial integrity strikes me as being at the very core of Fourth Amendment values. It is appropriate to note, in this context, the impressive words of the Constitution of the Union of Soviet Socialist Republics:

> "Article 55. Citizens of the USSR are guaranteed inviolability of the home. No one may, without lawful grounds, enter a home against the will of those residing in it.
>
> "Article 56. The privacy of citizens, and of their correspondence, telephone conversations, and telegraphic communications is protected by law.
>
> "Article 57. Respect for the individual and protection of the rights and freedoms of citizens are the duty of all state bodies, public organisations, and officials.

> "Citizens of the USSR have the right to protection by the courts against encroachments on their honour and reputation, life and health, and personal freedom and property."

Constitution of the Union of the Soviet Socialist Republics, in 16 Constitutions of the Countries of the World 29 (A. Blaustein & G. Flanz eds. 1982).

We take for granted the meaningless nature of these words because the courts of that nation cannot, or will not, implement them to protect the rights of their citizens. In contrast, John Adams said of James Otis's argument against the colonial writs of assistance that "[t]hen and there was the first scene of the first Act of Opposition to the arbitrary Claims of Great Britain. Then and there the child Independence was born." 2 Legal Papers of John Adams 107 (L. Wroth & H. Zobel eds. 1965).

In this case, the goal of preserving judicial integrity is a sufficient justification for applying the exclusionary rule, since it is a judge who committed the violation. "It is the duty of [judges] to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Boyd* v. *United States*, 116 U.S. 616, 635 (1886).

What becomes of judicial integrity when three members of this court appear to condone the egregious judicial error involved in this case? And what is left of the most significant protection embedded at the core of the Fourth Amendment and art. 14 values, namely the role of a neutral and detached magistrate in determining the validity and terms of a search? See *Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319 (1979); *Connally* v. *Georgia*, 429 U.S. 245 (1977); *Shadwick* v. *Tampa*, 407 U.S. 345 (1972); *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971). The crucial role of a magistrate is to determine whether probable cause for a search warrant exists and, just as importantly, to describe with particularity the place to be searched and the things to be seized. *Stanford* v. *Texas*, 379 U.S. 476 (1965). *Marcus* v. *Search*

Warrant of Property at 104 E. Tenth St., Kansas City, Mo., 367 U.S. 717 (1961).[10]

The particularity requirements of the Fourth Amendment are "precise and clear. They reflect the determination of those who wrote the Bill of Rights that the people of this new Nation should forever 'be secure in their persons, houses, papers, and effects' from intrusion and seizure by officers acting under the unbridled authority of a general warrant." *Stanford* v. *Texas, supra* at 481. In the instant case, the plurality condones "a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." *Weeks* v. *United States*, 232 U.S. 383, 394 (1914). Although "[t]he criminal goes free, if he must, . . . it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." *Mapp* v. *Ohio*, 367 U.S. at 659.

The language the plurality opinion uses in reaching the correct result mandated by State and Federal law does unnecessary harm to a body of law now well-established in our jurisprudence. The case is "serious" but there is nothing "challenging" about this issue except the plurality's unnecessary and unhappy incursion into a field of law well rooted in American history. One cannot but wonder as to the purpose of such treatment of an issue so clear-cut. It would be well to keep in mind that what was involved here is a search of a home, the most sacrosanct of places under Fourth Amendment jurisprudence. "The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home — a zone that finds its roots in clear and specific constitutional terms: 'The right of the

[10] One should not have to add that, in every one of the decisions cited here which involves a defective warrant issued by a magistrate, the fruits of the search conducted under the authority of the defective warrant were suppressed.

people to be secure in their . . . houses . . . shall not be violated.' That language unequivocally establishes the proposition that '[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.' *Silverman* v. *United States*, 365 U.S. 505, 511 [1961]. In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house." *Payton* v. *New York*, 445 U.S. 573, 589-590 (1980). The violations of the Fourth Amendment and our State laws involved here were not merely "negligent." They were inexcusable.[11] The warrant was clearly defective. The search of this dwelling was as though without a warrant. The evidence illegally obtained as a result must be suppressed without question.

[11] I point out also that despite the plurality's attempt to excuse the conduct here on the ground that the defendant was "at liberty" (*supra* at 497) and that there was need for "prompt action" (*supra* at 504 n.17), the evidence shows that an arrest warrant had been issued for the defendant, and that the police knew he was not at home and dispatched a team of officers who arrested him at another place at the same time the search under the defective warrant was conducted.

Appendix.

To the Justices of the Municipal Court of the ~~Dorchester~~ ROXBURY District, holden in said Dorchester District for the transaction of criminal business within the County of Suffolk:

of Boston in the County of Suffolk, Police Officer, on oath informs the said Court, that he has reason to believe that any controlled substance, article, implement or other paraphernalia used in, for, or in connection with the unlawful possession or use of any controlled substance, is kept or deposited by OSBORNE SHEPPARD some person or persons unknown to the said in certain rooms in the 2-UP-&-BASEMENT story of the building situated and numbered 42 in DECKARD ST. street in said city and within the judicial district of said Court and prays a Warrant to search there for the same.

Received and sworn to before this Court, this 6TH day of MAY in the year of our Lord one thousand nine hundred and seventy NINE

Clerk.

Commonwealth of Massachusetts

SUFFOLK, TO WIT:

To the Sheriff of our County of Suffolk, his Deputies, and the Constables and Police Officers of the City of Boston in said County: GREETING.

We COMMAND YOU, and each of you forthwith, with necessary and proper assistants, to enter in the day time or in the night time in the mentioned in the above information, and there diligently to search for any controlled substance, article, implement or other paraphernalia used in, for, or in connection with the unlawful possession or use of any controlled substance, and to seize and securely keep the same until final action, and to arrest the person or persons in whose possession it is found, together with all persons present if any of the aforesaid substances is found, and bring them before said Court to be dealt with according to law, and return this warrant with your doings thereon.

You are also commanded, in like manner, to notify the informant to appear and give evidence touching the matter contained in the above complaint, when and where you have the said substances and persons or either of them.

TOBIAH F. FEENEY MAIL, TO 142 COURT ROXBURY DIVISION

WITNESS, ~~PAUL H. KING~~, Esquire, at Boston, in said ~~Dorchester~~ District, this SIXTH day of MAY in the year of our Lord one thousand nine hundred and seventy MAY 6

Joseph F. Feeney Clerk
Asst. Justice, Mun. Trial Court

LYNCH, J. (dissenting). It is undisputed that the search warrant used in this case to seize highly probative evidence linking the defendant to the murder of Sandra Boulware was formally defective. At issue in this appeal is the question whether the failure of the issuing magistrate to include in a search warrant, issued on probable cause, a list of the items to be seized or to incorporate such a list by reference to the police affidavit necessitates the application of the exclusionary rule where the search and seizure is limited to the items described in the affidavit. This court has concluded that the decisions of the United States Supreme Court mandate suppression of this evidence. *Supra* at 489, 509. I believe, however, that the majority's conclusion represents a misreading of the relevant Supreme Court precedent and that its application of the exclusionary rule is inappropriate on the facts in this case. Accordingly, I dissent. I believe that a careful exploration of the purposes behind both the particularity requirement of the Fourth Amendment to the United States Constitution, which the police and judge inadvertently violated here, and the exclusionary rule demonstrates that the trial judge's admission of this evidence was proper on these facts.

The Supreme Court has noted that the particularity requirement was included in the Fourth Amendment to protect citizens from the general warrants and writs of assistance that were commonly used by the British against the colonists. *Boyd* v. *United States*, 116 U.S. 616, 624-627 (1886). These general warrants granted British officers unbridled discretion to search the place and belongings of the colonists and placed "the liberty of every man in the hands of every petty officer." *Id.* at 625. See also *Marron* v. *United States*, 275 U.S. 192, 195-196 (1927). The particularity requirement of the Fourth Amendment is directed at this specific evil. It requires that those searches that are deemed necessary should be as limited as possible: "[T]he problem is not that of intrusion *per se*, but of a general, exploratory rummaging in a person's belongings." *Coolidge* v. *New Hampshire*, 403 U.S. 443, 467 (1971). Also, evi-

dence seized under a general warrant is unlikely to be supported by probable cause. Specificity in the warrant limits the potential for such abuse. *Id.*

In the present case none of the evils associated with searches under such warrants occurred. At all times, Detective O'Malley and his colleagues conducted their search for evidence in a manner that scrupulously adhered to the limits that were specified in the affidavit and that they believed in good faith the judge had authorized. The police searched only in the places particularly described in the warrant and they seized only the relevant murder evidence described in Detective O'Malley's affidavit. They neither assumed nor exercised any discretion in the search. The police officers sought prompt judicial approval for their search warrant and searched no further than specified in the affidavit. No "rummaging" among the defendant's belongings occurred. In the face of the dedication shown by these police officers to the spirit and purposes of the Fourth Amendment, abstract fears of "general warrants" and "writs of assistance" are completely misplaced.

More importantly, even conceding that the detective's carrying the affidavit on his person rather than attaching it to the warrant rendered the warrant formally defective, I believe that application of the exclusionary rule to suppress the evidence seized brings about too harsh a result. The plurality opinion correctly points out that the substantial, and perhaps only, justification for the exclusionary rule relied upon by a majority of the justices of the Supreme Court is the goal of deterring unconstitutional conduct by the police and other law enforcement personnel. *Supra* at 502. The plurality opinion also recognizes the existence of factors in this case which, in my opinion, militate against the application of the exclusionary rule. That opinion acknowledges that the police conducted the search in a good faith belief, reasonably held, that the search was lawful and authorized by the warrant issued by the judge; the defect in the warrant was not harmful to the defendant in the circumstances of the actual search; the search was conducted

in the same way and with the same results as it would have been conducted if the warrant had not been defective; the error in the warrant consisted of the judge's failure, negligently but in good faith, to strike out certain clearly inapplicable words printed on the blank form and to attach to it (or to incorporate by reference to the affidavit) a list of the items to be seized; the Supreme Court has not applied the exclusionary rule to a judge's error in such circumstances; there may be reasonable distinctions between police misconduct and the errors of magistrates; the judge's conduct was neutral and detached; he did not undertake the role of the police and become concerned with ferreting out crime; the exclusionary rule is not well tailored toward deterring judicial misconduct since the suppression of a particular piece of evidence may not be as effective a disincentive to a neutral judge as it would be to the police; the defendant was not prejudiced by the magistrate's error; and various members of the Supreme Court have made statements critical of the application of the exclusionary rule in particular circumstances (not unlike those found to exist here). *Supra* at 503-506. The majority nevertheless concluded that the exclusionary rule requires the suppression of the evidence seized. I believe that the factors summarized above, which three members of this court apparently agree are of significance, compel the conclusion that the evidence seized at 42 Deckard Street need not be suppressed under the United States or the Massachusetts Constitution.

The Supreme Court has noted with concern that "[e]ach time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights. Relevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected." *Rakas* v. *Illinois*, 439 U.S. 128, 137 (1978). Frequently the evidence sought to be excluded is "the most probative information bearing on the guilt or innocence of the defendant." *Stone* v. *Powell*, 428 U.S. 465, 490 (1976). Consequently, "[a]pplication of the [exclusionary] rule . . . deflects the

truthfinding process and often frees the guilty. The [resulting] disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice. Thus, although the rule is thought to deter unlawful police activity in part through the nurturing of respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice." *Id.* at 490-491.

To minimize the social cost resulting from the indiscriminate application of the exclusionary rule, the Supreme Court has held that this judicially made rule is not coextensive with the Fourth Amendment. *Stone* v. *Powell, supra* at 486, 488-489. *United States* v. *Calandra*, 414 U.S. 338, 347-348 (1974). Rather than applying the exclusionary rule reflexively, the Court has stated that judges should weigh the value of deterrence of police misconduct gained in applying the rule against the "further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." *Stone* v. *Powell, supra*, quoting from *Alderman* v. *United States*, 394 U.S. 165, 175 (1969).

Thus, it is clear that the policies underlying the exclusionary rule are not absolute and they must be evaluated in light of competing considerations: "As with any remedial device, the application of the [exclusionary] rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *Calandra, supra* at 348. Here, application of the exclusionary rule will serve no beneficial purpose. Police misconduct will not be deterred because none occurred. The human error committed by the judge harmed no rights of the defendant, as nothing beyond the evidence listed in the affidavit was searched for or seized. By contrast, application of the exclusionary rule

will result in the very substantial harm of withdrawing highly probative evidence from the trier of fact.

In discussing the need for applying the exclusionary rule under the Fifth Amendment to the Constitution of the United States, the Supreme Court has cautioned that before we penalize official misconduct we must consider whether the sanction serves a valid and useful purpose. *Michigan* v. *Tucker*, 417 U.S. 433, 446 (1974). I can perceive no valid and useful purpose for applying the exclusionary rule to the good faith search and seizure performed by the police here, albeit under a defective warrant. The failure of the judge or the police to attach the affidavit to the revised warrant form was merely a harmless error, but under the majority's holding the consequences are Draconian: for want of a staple, highly probative evidence is lost. Such dedication to rigid formality is commanded neither by the Constitution nor by logic. I respectfully dissent.